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IN THE

Supreme Court of the United States

OCTOBER TERM 1962

No. 466

DANIELS & KENNEDY, INC.,

Petitioner,

against

A/S INGER and ILLINOIS ATLANTIC CORP.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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No. .....

DANIELS & KENNEDY, INC.,

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v.

A/S INGER and ILLINOIS ATLANTIC CORP.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Daniels & Kennedy, Inc., prays that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Second Circuit filed July 3, 1962 and amended August 17, 1962, and the denial of said petitioner's petitions for rehearing and for rehearing *in banc*, without opinion, filed on August 17, 1962, insofar as said decisions and judgment affirmed that part of a final judgment entered in the United States District Court for the Eastern District of New York on June 12, 1961 which, in a longshoreman's personal injury case, granted indemnity to respondent A/S Inger against petitioner, and dismissed petitioner's cross-complaint against respondent Illinois Atlantic Corp.

Opinions Below

The District Court's opinion (appendix, pp. 1a-26a) is reported at 194 F. Supp. 398.

The opinion of the Court of Appeals (appendix, pp. 27a-34a) has not yet been reported, and its decisions on the petitions for rehearing and for rehearing *in banc* (appendix, pp. 35a-37a) are also unreported.

Jurisdiction

Judgment was entered in the United States Court of Appeals for the Second Circuit on July 3, 1962.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented for Review

I

Where the Shipowner* was found negligent in supplying equipment for the Longshoreman's use which lacked a safety device and further negligent in not remedying the deficiency after having constructive notice of its existence from at least the inception of stevedoring operations aboard the vessel and its negligence in failing to provide the safety device in conjunction with the Longshoreman's negligent manner of using the equipment brought about the injury was the Shipowner properly awarded full indemnity from the Employer as a matter of law for both the amount recovered by Plaintiff against it, as mitigated by his contributory negligence, and the amount of its defense

* In the interest of clarity the parties will hereinafter be called by descriptive designations. Petitioner will be called either the Stevedore or Employer, respondent Inger the Shipowner, respondent Illinois the Charterer and the plaintiff either Plaintiff or the Longshoreman.

expenses despite its manifold negligence and breaches of its contractually undertaken obligations to maintain and keep the vessel's equipment in a thoroughly efficient state for and during its service and to maintain the gear of the vessel as fitted which led directly to its own initial liability upon the premise that firstly, the Employer's presence aboard the vessel for more than 4 hours constituted a breach of its undertaking to unload the vessel in a prompt and efficient manner because that time factor gave it constructive notice of the deficiency and therefore made it negligent *vis-à-vis* plaintiff, and, secondly that the Shipowner's breaches must not only be excused but must be attributed to the employer?

Stated otherwise: Where a Shipowner by negligently (1) supplying defective equipment and (2) failing to remedy the defects after notice, breaches the promises it made to supply and maintain ship's equipment in proper order with the result that a Longshoreman is injured while using the equipment, are the Shipowner's contractual breaches excused and rendered immaterial and is it entitled to indemnity as a matter of law from the Employer who has neither contracted to repair ship's equipment, nor has been negligent in aggravating or heightening the danger set in motion by Shipowner's foundational breaches, nor had any actual or real knowledge of the deficiency?

Encompassed within these questions are following specific questions of law which the District Court's factual findings project:

1. Was the Stevedore-Employer's mere working presence aboard the vessel for a period of time a breach of its warranty of workmanlike services as a matter of law?

2. Did the Stevedore as a matter of law by contractual implication obligate itself to Shipowner to inspect for, detect and correct deficiencies in equipment furnished by the Shipowner?

3. Did the Courts below confuse and thereby make synonymous the Stevedore's duties to the Longshoremen with its contractual obligations to Shipowner?

4. Did the fact that the Stevedore became negligent to the Longshoreman when the Shipowner supplied deficient equipment convert that negligence into a breach of Stevedore's warranty of the workmanlike services as a matter of law?

5. Did the Shipowner's multiple misconduct when related to the nature of the breach of contract ascribed to the Stevedore constitute conduct on the part of Shipowner sufficient to preclude indemnity?

6. Did the Shipowner's warranty of the fitness of the appliances it supplied for Stevedore's employees' use dissipate as a matter of law shortly after stevedoring operations commenced even though the Shipowner did not inform the Stevedore of the deficiency, the Stevedore did not have actual knowledge of its existence and the stevedoring contract did not require the Stevedore to inspect or repair ship's equipment.

7. When the Shipowner undertook to supply equipment for use by the Stevedore's employees, did it not owe to the Stevedore the same contractual obligations with respect to the equipment it supplied which any other equipment supplier would?

8. Since under basic indemnity law principles the Shipowner's contractual breaches were of such nature as to have ordinarily entitled Stevedore to indemnity from Shipowner if Stevedore had been sued and held liable to Plaintiff, despite Stevedore's constructive notice, is not Shipowner's indemnity claim therefore precluded?

9. If the Shipowner's contractual breaches may only be used offensively, but not defensively, is the Stevedore

on its cross-complaint entitled to indemnity from the Charterer because of the breach by Charterer of its contractual warranties referrable to ship's equipment, and could not then the Charterer in turn recover indemnity from Shipowner because of Shipowner's breach of warranty?

10. If Stevedore materially breached its warranty as a matter of law because of constructive notice and failure to correct, were not the Shipowner's identical notice and failure to correct, plus its primary foundational wrong in negligently supplying the deficient appliance, material breaches of its warranties which as a matter of law constituted conduct on its part sufficient to preclude indemnity?

11. Since it was found that the conjoined negligence of Shipowner and Plaintiff brought about Plaintiff's injury, was it not improper to conclude that the contractual breach attributed to Stevedore led to Shipowner's liability?

12. Although the question was avoided by both Courts below, though briefed to them, it may be that upon granting review this Court would also desire to decide the question of whether Plaintiff's status as Stevedore's employee permitted a conversion of his negligence in bringing the deficient condition into play into Stevedore's contractual breach despite the fact that the Shipowner has already obtained full reimbursement for that portion of the damages attributable to Plaintiff's contributory negligence by means of mitigation of his damage award?

13. In the final analysis, the question is whether the mere passage of some period of time between the inception of stevedoring operations and an accident to a longshoreman sets at naught a shipowner's contractual obligations to a stevedore and what should be the shipowner's liability to the stevedore for their breach, and, moreover, transform them instead into the stevedore's contractual obligations

to a shipowner and the stevedore's liability to the shipowner for such breach?

14. Put more bluntly, has the Supreme Court in formulating the maritime law created a pecking order in longshoremen's personal injury cases with longshoremen's employers as the chicken of lowest order upon whom must fall ultimate liability for the full amount of the injured longshoremen's recoveries against shipowners and counsel fees and expenses incurred by shipowners in their own defense?

II

Where a stevedoring contract specifically covers the subject of indemnity by an express indemnity and hold harmless provision, may a shipowner disavow the existence of such provision and claim indemnity under the self-same contract upon the basis of an alleged breach of an implied warranty of workmanlike service and a consequent implied obligation to indemnify?

Statement of the Case

Plaintiff, who as the Stevedore's employee, was the operator of the No. 2 starboard winch of the Shipowner's vessel the *Elin Hope* during its unloading injured his right foot when it was caught in winch's piston or piston shaft.

Suit against Shipowner on claims of negligence and unseaworthiness ensued. Invoking Rule 14 F.R.C.P. Shipowner claiming indemnity impleaded both Stevedore and Charterer as third-party defendants. They, in turn, cross-complained for indemnity against one another. Shipowner sought indemnity from Stevedore upon the basis of a claim that Stevedore created an unseaworthy condition which caused the accident and it thereby breached its implied warranty of workmanlike services; and, upon the express

indemnity provisions in the contract between Stevedore and the cargo consignee, News Syndicate Co., Inc., which provided that Stevedore indemnify the News, its subsidiaries and affiliates, and any other persons and companies for which the News may be handling paper.* Stevedore claimed indemnity from Charterer because it through the Shipowner furnished the accident-producing deficient equipment and consequently both breached its contractual promises and was actively negligent as contrasted to Stevedore's passive negligence.

The facts in brief are: The News purchases newsprint from the Quebec North Shore Paper Company of Baie Comeau, Canada. Shipments to New York are via Shipowner's vessel, the *Elin Hope*, which exclusively engages in shuttling between Baie Comeau and New York while the St. Lawrence waterways are navigable. Her sailing time between ports is approximately 5 days, and her combined total loading and unloading time is contractually fixed at 5 days.

When she arrives in New York, Stevedore unloads her pursuant to its contract with the News which provides, *inter alia*, that Stevedore "provide all necessary labor and services to discharge, unload and handle paper from ships * * * in a prompt and efficient manner * * * with all reasonable speed", and that stevedoring charges "cover any and all costs of unloading from ships with ship's gear." There is nothing in the contract which requires Stevedore to inspect or repair ship's gear.

For this service, the vessel operates under a written time charter which obligates Shipowner to "keep the vessel

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* No proof was offered to support the allegation of Stevedore's creation of the condition. After the verdict in the main action Shipowner's contention was that Plaintiff's negligence be imputed to Stevedore as a basis for the indemnity claim (Pet. appendix below, 585a). The Shipowner also unilaterally withdrew its second claim based upon the express indemnity provision without consent or acquiescence by the Stevedore (Pet. appendix below, 66a-70a).

in a thoroughly efficient state in hull, machinery and equipment for and during the service," to "maintain the gear of the ship as fitted", and to give Charterers use of any gear on board.

The undertakings Shipowner assumed in the Charter were the same as those Charterer had previously assumed toward Shipper and Consignee in the contract of Affreightment between Shipper and Charterer, which additionally stated that unloading was to commence when the Captain reported the vessel ready.

Evidencing by actions speaking louder than words to confirm and define its plain contractual undertakings, the Shipowner's crew, in anticipation of necessary use in the unloading operation, inspects the vessel's unloading gear and machinery before supplying it for the New York longshoremen's use. Given good weather, such inspections are made at sea during the voyage. If the weather is bad, they are made after docking but before longshoremen come aboard.

Winches are inspected or should be inspected, by the ship's engineer for the purpose of ascertaining among other things, whether each has a safety pin for its handle. The engineer is responsible for making any necessary winch repairs.

There was good weather during the entire voyage from Baie Comeau to New York. The winch inspection was made en route.*

Once unloading operations begin, the ship's officers tour the deck and observe its gear's mechanical functionings and the ship's carpenter makes half-hourly rounds greasing and oiling the winches.

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* Information relative to the crew's gear inspection and repair duties came from the testimony of the Shipowner's Mate and witness, Johnson.

On this occasion, the *Elin Hope* tied up to the News' pier at 7:20 a. m. on January 4, 1956. At 8:00 a. m. six gangs of longshoremen came aboard to unload the vessel's six hatches.

Plaintiff, a winchman with 24-25 years experience as such, who had worked the *Elin Hope's* winches on approximately 50 prior dockings, was the starboard or burton winchman of Eddie Lanzeri's gang which worked the #2 hatch.

Once aboard, plaintiff immediately proceeded to his regular assignment, and at that time noticed that his winch lacked a safety pin—a pin hung from a chain attached to the winch and inserted into a hole on the winch handle's hub when the winch is unattended thereby locking the winch handle in neutral and preventing winch movement in the event of accidental contact with the handle. The pin plays no part in the operational use of the winch.

Plaintiff at no time reported the absence of the pin to anyone connected with either the Employer or the Shipowner.

He used the winch without any untoward incident until 12:00 noon when he inactivated the winch by closing down its steam valve and went to lunch.

Returning at 1:00 p. m. he opened the valve. Shortly thereafter he was advised that work would be suspended at hatch #2 because continued operation there would endanger men working at adjoining #1 hatch which had fallen behind.

So advised, Plaintiff went to close the steam valve. Instead of reaching over to the valve from the winch's starboard side, he sought to reach it from the port side by stepping on the piston shaft. In so doing, he lost his balance, fell over the winch handle, thereby activated the winch. Its piston movement injured his toe.

Johnson, the ship's officer who testified, was not more than 3 feet away from Plaintiff when the accident happened. Contradicting Plaintiff, he said that after the accident he saw the pin in its appropriate place properly affixed to a chain and at that time inserted it into the hole in the winch handle.

Only the main action was tried to a jury, it having been stipulated that the issues on an amended third-party complaint and the respective cross complaints be determined by the Court.

The jury's verdict was in Plaintiff's favor and against the Shipowner for ¼ of the total damages. It specially found the vessel not unseaworthy but the Shipowner negligent and Plaintiff 75% contributorily negligent.

In its findings in the third-party action, the District Court properly determined that implicit in the jury's verdict was a finding that Shipowner was negligent in not providing a safety pin which, if provided, and used would have avoided the accident.

Additionally, it found that Plaintiff's contributory negligence lay in his stepping on the piston rod and leaning over the winch operating handle in order to reach the steam valve whereas proper procedure and due care called for him to walk around the winch and turn it off from the starboard side. It is significant that, though Plaintiff was the winch's operator, the Court neither found him negligent in continuing use of the pin-lacking winch nor in failing to inform either Shipowner or Stevedore of its absence.

The District Court found that "it was the Plaintiff's own negligence in conjunction with the negligence of the Shipowner in failing to provide a safety pin that brought about the injury."

It added that Johnson, and therefore the Shipowner, did not affirmatively know of the pin's absence before the accident, but the Shipowner was additionally negligent in not correcting the dangerous condition—i.e. the missing pin—that it reasonably should have discovered.*

Turning to the Stevedore, the District Court reasoned that because the Stevedore's operations were going on from 8:00 a. m. to 1:15 p. m. (less one hour for lunch), it, too, had constructive notice of the pin's absence. It concluded that such constructive notice amounted to Stevedore's negligent failure to correct the condition or have it corrected, and, from this it further concluded that such negligence equalled a breach of the Stevedore's warranty of workmanlike service for, under its view of the law, once a Stevedore is said to be negligent, without regard toward whom and upon what basis the negligence charge is levelled, that *ipso facto* constitutes a breach of a Stevedore's warranty and entitles a Shipowner to indemnity. It opines that without exception it has been held that Stevedore negligence constitutes a breach of its warranty.

As to the Shipowner's manifold misconduct in supplying a deficient winch and failing to rectify the deficiency after notice at least on a par with that of Stevedore, the District Court concludes that, first, a lack of symmetry in the law and, second, its inability to find a case which denied a Shipowner indemnity because of its own conduct as a matter of law mandated that it excuse the Shipowner's breaches and characterize its wrongdoings as falling within

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* Although specifically called to the attention of the Courts below neither took cognizance of Johnson's testimony relative to the ship's engineer's winch inspection and repair duties. Such testimony demonstrated that the engineer was either negligent in not discovering the defect during his inspection or negligent in failing to repair the condition which his inspection if properly made would have disclosed. This testimony at the very least made it plain that winch inspection and repair responsibilities belonged to the Shipowner and not to the Stevedore.

the range of the permissible or privileged, leaving its claim to indemnity unaffected.*

In the Court of Appeals the Stevedore did not challenge the District Court's factual findings. Its protests were to the legal conclusions drawn therefrom.

The Court of Appeals' opinion of affirmance had to, and said that it did, accept the factual findings for they were not clearly erroneous. It also acknowledged that the Shipowner was guilty of breaching at least one contractual obligation, i.e. its undertaking to supply proper winches.

However, it too winked at the Shipowner's breaches. Instead, it focused solely upon the negligence stigma Stevedore vicariously derived from the Shipowner's foundational derelictions. Using patent hyperbole, it distorted the Stevedore's presence aboard the vessel for 4¼ hours into a charge that the Stevedore after notice of the deficiency permitted continued use of the winch and that its unworkmanlike services was responsible for bringing the defect into play and causing the injury. By a shuffle of words, it obscured the fact that it was the Shipowner's breaches which loosed the hazard, caused the accident and directly led to its initial liability, and that such breaches were the basis for charging Stevedore with negligence to plaintiff in the first instance. It turned the parties' contractual undertakings completely around. It transferred to the Stevedore the very obligations which the Shipowner contracted to perform and charged the Stevedore with a breach of contract and indemnity liability because the Shipowner's substandard performance caused the accident.

What emerges is that by use of verbal barrages, the opinions below have so completely altered the facts initially found that Stevedore finds itself being saddled with the

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* It seems that if all lower courts were to assume the attitude adopted here until the Supreme Court gives a lead there never will be a case where indemnity is denied because of shipowner misconduct.

very obligations the Shipowner promised to perform. They have written into the Stevedore's contract to unload, an undertaking to the Shipowner to discover and correct deficiencies in the vessel's equipment, and written out of the Shipowner's agreement its undertaking to provide and keep the vessel's equipment fit. The Stevedore has thus been placed in a position of warranting to the Shipowner the propriety of the ship's own equipment. The real meaning of the opinions below is that stevedores are shipowner's insurers and as such are required to indemnify shipowners for shipowner's own negligent violations of their contractual promises referrable to ship's equipment.

The erroneous conclusions below stem primarily from the false premise that a Stevedore's negligence equals a breach of warranty to a Shipowner. The unsoundness of the premise emanates from a confusion of the duty which the Stevedore owed to Plaintiff as its employee with the obligations it owed to the Shipowner despite the clear admonition in *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.*, 350 U. S. 124, 76 S. Ct. 232, 238, 100 L. Ed. 133, that duties owed to the injured workman are not to be used as the guides for evaluating indemnity rights between shipowners and stevedores.

The Courts below compounded this confusion to justify turning their backs on the clear fact that the Shipowner's breach of its contractual obligations to supply and maintain the winch in proper order, unamplified by any Stevedore misconduct, led directly to the occurrence and to Shipowner's liability.

Reasons for Granting the Writ

I

(A) Ever since the *Ryan* case, *supra*, granted indemnity to a shipowner as a matter of law, longshoremen's personal injury suits against shipowners have, with but rare exception, sprouted indemnity claims by shipowners

against the longshoremen's stevedore-employers. And, inasmuch as the succeeding *Weyerhaeuser S.S. Co.* v. *Nacirema Operating Co.*, 355 U. S. 563, 78 S. Ct. 438, 2 L. Ed. 2d 491, *Crumady* v. *The J. H. Fisser*, 358 U. S. 423, 79 S. Ct. 445, 3 L. Ed. 2d 413, and *Waterman S.S. Corp.* v. *Dugan & McNamara*, 364 U. S. 421, 81 S. Ct. 200, 5 L. Ed. 2d 169, cases were favorable to shipowners *vis-à-vis* stevedores on the narrow issues decided therein, it seems that lower courts have taken this to mean that the Supreme Court has mandated that indemnity be given to shipowners as a matter of law in all cases regardless of the facts, and that every effort be bent toward finding a means of passing shipowner's liabilities over to stevedores even if the principles enunciated by these very cases must be brushed aside or distorted.*

If such is not the case, that notion must be quickly dispelled. While lower Courts labor under such belief, as the case at bar evidences, they will tend to abandon the requisite, though difficult, independent analytical approach to concrete factual situations and instead apply the words, but not the ideas, of the Supreme Court cases and automatically and indiscriminately stamp stereotyped conclusions granting indemnity onto all cases even though the facts call for the opposite result. Another though like danger is that lower Courts, in order to justify conclusions which they think mandated by the Supreme Court cases, will mold their factual findings by emphasizing, de-emphasizing or overlooking facts so as to enable an easier fit to a prejudged conclusion which would be incongruous if tacked onto the full factual picture.**

Here, indemnity was awarded as a matter of law upon clear and undisputed facts. By granting the petition and

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* *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.*, 369 U. S. 355, 82 S. Ct. 780, 7 L. Ed. 2d 798, was decided after the appeal below was argued but before decision.

** Witness for example the separate reasons advanced by the District Court and the Court of Appeals for excusing the Shipowner's breaches and for charging Stevedore with a breach.

considering whether the Courts below have truly accepted the concepts embodied in its prior decisions or whether they were ignored in principle but bowed to by ritualistic, albeit empty, use of their words, this Court can mark out boundaries which will serve as guides in future cases and thus prevent future misconception of the meaning of its decisions.

The rationale of the opinions below distilled to their pure essence is: Since the Shipowner's breaches of contract made the Stevedore negligent to Plaintiff it also made it guilty of breaching its warranty to the Shipowner and, therefore, the Shipowner's breaches did not merely evaporate, they became the Stevedore's breach and required it to indemnify Shipowner.

True application of the principles of this Court's prior opinions to the facts as found required a dismissal of the indemnity claim as a matter of law for if the Stevedore was the one sued and held liable to its Employee it would have been entitled to indemnity from the Shipowner, despite Stevedore's so-called constructive notice. (See, *Mowbray* v. *Merryweather* [1895], 2 Q.B. 640; *The No. 34*, 25 F. 2d 602; Restatement of Contracts, § 334, illustration 5.)*

Below, the questions of Shipowner's negligence and contractual breach, Stevedore negligence and contractual breach, and Shipowner conduct precluding indemnity were improperly considered in sterile isolation from one another and without relation to the factual panorama in order to attain the desired result (Cf. *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690, 698-699, 82 Ct. 1404, 1410. Their method placed the question of

* And for cases which awarded indemnity to Shipowners where their employees are injured because of deficiencies in equipment furnished by others. See *Standard Oil Co.* v. *Robins Dry Dock & Repair Co.*, 32 F. 2d 182; *U. S.* v. *The Manzanillo*, 190 F. Supp. 229. See also, *Albina Engine & Machine Works* v. *American Mail Lines, Ltd.*, 263 F. 2d 311; *Pennsylvania Railroad Co.* v. *McAllister Lighterage Line, Inc.*; 240 F. 2d 423, affg. 137 F. Supp. 788.

Stevedore conduct in the foreground and kept it there magnifying it out of true relational proportion to the facts and the other questions. Thus, they micrified the Shipowner's breaches into mere inconsequential trivialities and the Stevedore's negligence to Plaintiff derived through Shipowner's breach into a Stevedore breach.

In treating of the meaning of the Stevedore's negligence they confused the Stevedore's duties to its Employee with regard to the equipment the Shipowner supplied and was supposed to maintain, with a contractual obligation owed by Stevedore to Shipowner. By thus equating Stevedore's duty to Plaintiff with Stevedore's duty to Shipowner, they transformed the Shipowner's breach to the Stevedore into the Stevedore's breach to Shipowner.

A logical and chronological approach by starting with the Shipowner's two-fold contractual breaches—the negligent breach in supplying defective equipment and the negligent breach in failing to correct after at least constructive notice of the defect, the first of which the Court of Appeals admits and the second of which is an equally clear breach of the undertaking to maintain the equipment—places the case in more proper perspective.

When a defective or deficient vessel or its equipment, or for that matter any unreasonably unsafe place or appliance is furnished, for the use of a stevedore's employees by a shipowner, or some other third person, and some time factor is involved, the stevedore becomes liable to its employee who is injured thereby, regardless of the fact that the third person had agreed with the employer to supply and maintain the equipment. This is so because, as between employer and employee, the employer owes to the employee a special duty—a non-delegable duty—to provide the employee with a safe place and safe equipment. And if injury results to the employee from impropriety of place or appliance, the employer becomes liable to him despite the fact that the true causal fault is that of the third per-

son who had undertaken to carry out supply and repair functions, and has breached his undertakings to the employer in that regard. (Cf. *Shenker* v. *Baltimore and Ohio Railroad Company*, 303 F. 2d 596.) But in such instance, while the employer becomes negligent to his employee and therefore liable to him, the employer has a right to indemnity from the third person whose contractual breach has led to the employer's liability, and the employer's constructive notice, i.e. its failure to discover and correct, cannot under *Ryan* and *Mowbray* be used to defeat the employer's indemnity right.

Such is the plain case here, but the Courts below, disregarding the fact that the Stevedore's negligence to the Plaintiff emanated from the Shipowner's breach, has equated that type of Stevedore negligence with a breach of its contractual warranties. By this error of understanding, the Supplier has been awarded indemnity from the Employer rather than the reverse in violation of the clear warning contained in the *Ryan* case. Actually indemnity has been awarded for no other reason than that the Stevedore is Plaintiff's employer.

Ryan makes it very clear that the Courts below have avoided its lesson when it said:

> (350 U. S. 130) "A like result (indemnity) occurs where a shipowner sues, for breach of warranty, a supplier of defective ship's gear that has caused injury or death to a longshoreman using it in the course of his employment on shipboard." (Matter in parentheses supplied.)
>
> • • •
>
> (350 U. S. 134) "Petitioner suggests that, because the shipowner had an obligation to supervise the stowage and had a right to reject unsafe stowage of the cargo and did not do so, it now should be barred from recovery from the stevedoring contractor of any damage caused by that contractor's uncorrected

failure to stow the rolls 'in a reasonably safe manner.' Accepting the facts and obligations as above stated, the shipowner's present claim against the contractor should not thereby be defeated. Whatever may have been the respective obligations of the stevedoring contractor and of the shipowner to the injured longshoreman for proper stowage of the cargo, it is clear that, as between themselves, the contractor, as the warrantor of its own services, cannot use the shipowner's failure to discover and correct the contractor's own breach of warranty as a defense. Respondent's failure to discover and correct petitioner's own breach of contract cannot here excuse that breach."

The stevedoring contract itself demonstrates that the term Stevedore negligence must be confined within the boundaries of the employee-employer relationship.* It is barren of even intimation that Stevedore assumed an obligation to the Shipowner to either inspect Shipowner's equipment or to remedy defect in it.

To the contrary, the ship's crew's inspection and repair activities demonstrate that such obligations by practice and tradition belong to vessel operators. The charter agreement by restating them in writing expresses the traditional understanding and settles the obligation of performance between Shipowner and Charterer.

Indeed, any steps by Stevedore in that direction would be an unauthorized duplication of Shipowner's contractually required activities and, therefore, would be neither a prompt nor an efficient discharge of Stevedore's undertakings to unload the vessel with all reasonable speed.

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* Actually the term "constructive notice" is also misused when applied to the Stevedore-Shipowner relationship since it presupposes a non-existent obligation running from Stevedore to Shipowner to discover and correct deficiencies in the vessel and its appliances. Of course, the term's usage is proper within the ambit of the Stevedore-Longshoreman relationship because once that relationship exists the duties owing by an employer to its employees come into being.

The cases on this subject clearly and uniformly confirm that a stevedore's work does not entail inspecting and repairing ship's equipment and that a stevedore owes no duty to a shipowner to discover and correct defects in ship equipment, albeit it owes such duty to its own employees (*Mowbray* v. *Merryweather, supra; Berti* v. *Compagnie de Navigation Cyprien Fabre*, 213 F. 2d 397; *American Mutual Liab. Ins. Co.* v. *Matthews*, 182 F. 2d 322; *Sciarrillo* v. *Steamship S/S Fred Christensen*, 206 F. Supp. 182).

Mowbray, which *Ryan* used as a foundation stone, contains facts identical with those at bar. There a stevedore initially held liable to its own employee injured by patently defective equipment supplied by a shipowner, was, despite having constructive notice, awarded indemnity against the shipowner because of the shipowner's breach of warranty in supplying defective equipment led to the stevedore's liability to its employee.

The Restatement of Contracts (§ 334) adopted *Mowbray's* precepts, stating in Illustration 5:

> "A contracts to supply B with apparatus for unloading cargo. A chain so furnished by A is defective, and by reason of its breaking C is injured. C gets judgment for damages against B, his employer. B can get judgment against A for the amount so paid."

Here, the Courts below have not merely denied indemnity to a Stevedore in *Mowbray's* position *vis-à-vis* a Shipowner, they have awarded indemnity against it.

In *American Mutual* an identical fact picture is again presented. A guy rope furnished by shipowner with a patent defect broke while being used by a stevedore's employees. There it was said:

> (182 F. 2d 324) "In both of those cases (*Westchester Lighting Co.* v. *Westchester Estates*, 278 N. Y. 175, 15

N. E. 2d 567, and *Rich* v. *United States*, 177 F. 2d 688), the primary cause of injury to the employee was breach of a contractual duty owed to the promisee to do the work properly. In the case at bar no promise by the employer can be implied that he will not use equipment furnished him by the shipowner to be used for the very purpose to which it was put. Nor can a promise be implied that he will use care to detect any defect in the equipment which patently existed when the equipment was delivered for use by the employer. To imply such a promise would mean that the employer agreed to protect the shipowner against liability arising out of the shipowner's own negligence. In the absence of an express promise, such an implication would be utterly unreasonable. Hence we can find no contractual basis for *indemnity* or contribution." (Matter in parentheses and emphasis supplied.)

* * *

(182 F. 2d 325) "In the case at bar the stevedoring firm never owed the shipowner a duty to discover defects in equipment which the shipowner furnished for its use in loading the ship. Its duty to discover patent defects in such equipment was owed only to its employees and that duty the Longshoremen's Act abolished, substituting therefor an absolute duty to pay compensation."

Berti said:

(213 F. 2d 401) "American (the stevedore) had no duty to inspect, but it was fully aware of the condition of ship's equipment." (Matter in parentheses supplied.)

Here there can be no factual basis for a statement that this Stevedore was "fully aware of the condition". The factual finding is directly to the contrary on this point.

Ryan demonstrates that under the facts this Shipowner as the one who set in motion the danger which led to the accident is more properly fitted to the indemnitor role than that of indemnitee for the breach of its warranty as supplier of defective ship's gear has caused the Plaintiff's injury (350 U. S. 130). When it negligently supplied the gear, it knew that it supplied it for Longshoremen's use. When a Longshoreman was injured as a result, its own breach will have foreseeingly led directly to its own liability, and it cannot utilize the Stevedore's failure to discover and correct the condition as a basis for defeating Stevedore's indemnity claim, let alone as a basis for imposing an indemnity liability upon a Stevedore (Restatement of Contracts, § 330).

This Shipowner may no more be permitted to offensively use this Stevedore's failure to discover and correct this Shipowner's breach than could the stevedore defensively use the shipowner's failure to discover and correct in the stevedore's breach in *Ryan* (350 U. S. 134).

In the same vein *Weyerhaeuser* taught that if a shipowner's liability to a Longshoreman rested upon its 5 days worth of constructive notice of a defect in equipment by nature and service belonging to a stevedore, the shipowner would be entitled to indemnity. But, if shipowner's liability were premised on its negligence in furnishing the equipment without correcting the defect or warning of it, indemnity would not lie.

Weyerhaeuser has its counterpart in *Atlantic & Gulf Stevedores* which indicated that shipowner's initial liability predicated upon a determination that the unseaworthy and/or negligent cause of the accident was a deficiency in metal bands binding cargo, absent negligent stevedore cargo handling methods and procedures, mandates that indemnity be denied. In this case, it is to be remembered that the jury's verdict was based upon a determination that the Shipowner's negligence in supplying

defective equipment was the cause of the accident, and that the only negligence in method of use was that of Plaintiff himself, which had already been taken into account by mitigating his damages.

It was said in *Atlantic & Gulf Stevedores*:

> (369 U. S. 364) "So far as we know the jury may have found respondents liable not on either of those two grounds but solely on a third, namely because of defective bands—a matter which was covered by the charge to the jury on the issue of unseaworthiness, and properly so. *Weyerhaeuser S. S. Co.* v. *Nacirema Operating Co.*, 355 U. S. 563, 567, 78 S. Ct. 438, 440, 2 L. Ed. 2d 491. If that was the jury's view of the facts, then petitioner plainly would not be liable under its warranty."

Crumady presented a more complex factual situation. Although the vessel's initial liability rested upon a determination that an improperly set cut-off device on a boom rendered the vessel unseaworthy, the stevedore in grossly negligent disregard of the vessel's instructions against altering the boom's position malpositioned it and thereby subjected it to extraordinary stress and the stevedore was additionally operationally negligent in raising the draft. The stevedore's actions caused the otherwise harmless and quiescent unseaworthy condition to become a factor in the accident which would not have occurred absent its gross misconduct. Since the direct cause of the accident was stevedore's contractual breach in the grossly faulty method and manner of both using and misusing the equipment, indemnity followed. (See also, *Calmar Steamship Corp.* v. *Nacirema Operating Corp.*, 266 F. 2d 79, cert. den. 361 U. S. 816.) In a real sense in *Crumady* the unseaworthy or hazardous condition which brought liability to the doorstep of the shipowner was created by the stevedore's improper methods of operation. (See also, *United States*

v. *Arrow Stevedoring Co.*, 175 F. 2d 329; *American President Lines, Ltd.* v. *Marine Terminals Corp.*, 234 F. 2d 753, cert. den. 252 U. S. 926; Cf. *Amerocean Steamship Company* v. *Copp*, 245 F. 2d 291; *United States* v. *Harrison*, 245 F. 2d 911.)

Plainly *Crumady* does not warrant indemnity here where no Stevedore abuse or improper use of the deficient equipment heightened its inherent hazard. For that matter, the Stevedore did not even actually know of its existence, and nothing occurred to excite its suspicion of danger (*Sciarrillo* v. *Steamship S/S Fred Christensen, supra*). Analogy to *Crumady* may be drawn only by attributing Plaintiff's operational negligence to Stevedore.*

Furthermore *Crumady* demonstrates that the constructive notice indemnity theory is not proper for there the Stevedore could be said to have had such notice of the unseaworthy condition constituted by the cut-off device's setting by virtue of the continuous working of the winch for 1 hour before the occurrence. But, there is not the slightest suggestion in *Crumady* that indemnity could rest solely upon that basis.

If the *Crumady* boom had collapsed because of its condition alone, without the grossly improper usage to which the stevedore subjected it, indemnity would have been denied as a matter of law. (Cf. *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd., supra.*) Such is the factual situation here.

Moreover, even if it could be said that the Stevedore breached its contract on the basis of the constructive notice theory of the opinions below, it is factually apparent that it was not such breach which foreseeingly led to the Shipowner's liability. Such liability flowed in a straight line

* The Courts below did not take any stand on the question of whether an injured workman's negligence in bringing a defect into play can be imputed to his employer for the purpose of imposing an indemnity liability upon the employer. Therefore, although it was briefed below, it is not briefed here.

from the Shipowner's own breach of contract in furnishing sub-standard equipment and its super-added breach in not correcting the condition after itself having constructive notice and it was not heightened in any manner by the breach charged to the Stevedore. Indeed, the factual determination that the conjoined negligence of Plaintiff and Shipowner brought about the injury negates any theory that the Stevedore's breach led to the Shipowner's liability.

Furthermore, if the Stevedore is to be charged with materially breaching its contract by failing to do something about having the equipment repaired after constructive notice, must it not follow that the Shipowner, who had the contractual duty to repair, by its failure to repair after having at least equivalent notice, and its additional and initial negligence in supplying defective equipment materially breached its contract? (See, *Hodgson* v. *Lloyd Brasiliero Patrimonio National*, 294 F. 2d 32, cert. den. 369 U. S. 848, 82 S. Ct. 931; *Torres Cruz* v. *Hudson Steamship Company*, 206 F. Supp. 216).

Additionally, any suggestion that a constructively knowledgeable stevedore has an obligation to acquaint an at least equally knowledgeable shipowner with the stevedore's non-existent knowledge of the deficiency so that the Shipowner may repair, sets up an artificial, nonsensical and unrealistic set of manners for the conduct of shipboard activities. It suggests to stevedores that they go around and around in senseless circles talking to shipowners about things stevedores know nothing about.

In addition to erroneously equating Stevedore's negligence to Plaintiff with a breach of contract to Shipowner, the errors in holding that the Shipowner's conduct was not sufficient to preclude indemnity recovery were more significant. While in the former instance the opinions misinterpreted the law in failing to appreciate the separate natures of the obligations Stevedore owed to Plaintiff and to Shipowner, in the latter instance their failing was of a kind fundamentally destructive to the decisional process

itself and it cannot be bypassed or condoned lest it become accepted practice. They disregarded the facts of the case before them and instead substituted the facts from other cases so as to enable them to use the conclusions the other cases reached.

The District Court adopted to factual picture which the *dicta* in *Hugev* v. *Dampskisaktieselskabet International* 170 F. Supp. 601, affd. 274 F. 2d 875, cert. den. 363 U. S. 803, conjures up, and the Court of Appeals substituted the facts from its own opinion in *Pettus* v. *Grace Line, Inc.*, —— F. 2d ——.

Hugev's imagery which invokes visions of an obviously man and weather battered vessel limping into port, with conditions which the crew was powerless to rectify is certainly not in accord with the facts here. This vessel docked after 5 fine weather sailing days during which its engineer had ample opportunity to inspect the winches and make any necessary repairs, and there was certainly no Shipowner's warning of danger to the Stevedore and Stevedore's undertaking to correct as there was in *Hugev*. The District Court should have governed itself by the concrete record facts instead of allowing the "facts" of another case to serve as the premise for its conclusion.*

Reliance upon *Pettus* is also glaringly inappropriate. It too is factually grossly dissimilar. There the winch defect for which the shipowner was held liable, probably on unseaworthiness grounds, first manifested itself during operations; the stevedore's hatch boss actually knew of the defect and the fact that it made the movement of each draft imminently dangerous but, he nevertheless took no cautionary action and instead continued operations; and the jury in its verdict against the stevedore could have found that the defect developed after stevedoring operations had commenced and that the vessel's personnel were not in-

* Interestingly, *Hugev's* suppositions are proved totally incorrect at pages 360-362 of Two Years Before the Mast, by Richard H. Dana, Jr. (Harvard Classics, Shelf of non-fiction, Vol. 23) which was reproduced in petitioner's brief below.

formed of the defect before the accident by the fully and actually knowledgeable stevedore. Thus it could be said that the stevedore's continued use under these facts was an improper method of operation which brought the unseaworthy condition into play, and that relatively shipowner was not guilty of fault of such character as to preclude recovery. (See also, *American Export Lines* v. *Revel*, 266 F. 2d 82; Cf. *Hodgson* v. *Lloyd Brasiliero Patrimonio National, supra; Torres Cruz* v. *Hudson Steamship Company, supra.*)

Here the only Stevedore related person actually knowing of the deficiency and continuing to use the winch was Plaintiff, its operator. The jury either found him negligent in that regard and translated such negligence into a reduction in his verdict, or it did not find him negligent in continuing to use the winch. If the former, Shipowner has already been indemnified by Plaintiff for the damages attributable to his own negligence. If the latter, is it not nonsense to charge the otherwise unknowing Stevedore with negligence in the continuing use of the winch?

While it does not say so in specific language, the Court of Appeals' opinion makes it self-evident that it has adopted a policy of awarding indemnity to shipowners against employers in all shoreside workers' personal injury suits.

Using verbal alchemy, it has transmuted Shipowner's breach of contract into Stevedore's breach of contract so that in a factual situation which would ordinarily entitle Stevedore to indemnity from Shipowner, it has done just the opposite. By mere ritualistic incantation of the magic words: "unworkmanlike service of the Stevedoring company was responsible for bringing the defect into play and causing the injury", it has mechanically concluded that indemnity against the Stevedore must be granted as a matter of law.

In cavalierly excusing as a matter of law the Shipowner's contractual breaches in negligently supplying defi-

cient equipment and in failing to repair it after having at the very least just as much knowledge of it as the Stevedore, the Court also brushes aside its own opinion in *Booth S. S. Co.* v. *Meier & Oelhaf*, 262 F. 2d 310, by the perfunctory statement that the Shipowner is not a professional equipment supplier, and, therefore, even though it has acted as an equipment supplier and has breached an equipment supplier's warranties, it may not be held to account for such breaches.*

In this regard it must be said that what the Court said about *Booth* cannot possibly be reconciled with what it said in *Booth*. While *Booth* is totally relevant here, the following brief excerpt commenting upon the *Mowbray* case in which a Stevedore was awarded indemnity from a Shipowner (262 F. 2d 314) demonstrates the Court's inconsistency, and makes evident its treatment of shipowners as some favored class apart.

> "In the *Mowbray* case it was stipulated that the plaintiff's (stevedore's) failure to detect the defect was negligent, and in the others the fact that the defect was not hidden is equally clear. The point of concern in each case appears to have been whether the party suing for indemnity could recover despite his own possibly negligent failure to detect the flaw; and in all it was held that he could so recover." (Matter in parentheses supplied.)

What really has been said is that no matter what condition a ship's equipment may be in, and no matter what opportunity the shipowner has to remedy it, once a stevedore sets foot aboard to perform labor its inhalation of a few breaths of shipboard air invests a stevedore's person

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* One can only wonder who other than shipowners professionally supply a vessel's winches for longshoremen's use in unloading the vessel. In fact, this shipowner also acted as an expert inspector and repairer of the intrumentality as is evident by its engineer's activities. (See also, *Torres Cruz* v. *Hudson Steamship Company*, *supra*.

with an obligation to indemnify the shipowner for any and all shipowner derelictions and breaches of warranty.

In effect, the Stevedore is made to warrant to the Shipowner the adequacy and propriety of the Shipowner's own equipment, and Shipowner's obligations in regard to its own equipment are nullified. Where the Shipowner has committed a wrong, the Stevedore is being held to indemnify it for that very fault.

Apparently, the Court of Appeals has adopted shipowners as another group of wards of the Court, and it has secured to them, in keeping with their high position, whipping boys in the form of stevedores who must bear at shipowners' own hands those consequences for shipowner derelictions which would ordinarily fall upon shipowners if they were like other ordinary persons. Additionally, stevedores are also made to suffer the expenses incurred by shipowners in defending against the longshoremen's claims which the shipowners' own faults precipitated.

The foisting of liability upon this Stevedore not only contravenes the concepts inherent in the Supreme Court's opinions on the subject of indemnity, it also sets back the cause of accident prevention, an often ignored public policy factor in negligence law. If shipowners can so easily pass over all liability to stevedores, they will have no incentive to expend money or effort to repair or replace defective conditions in the vessels and equipment they bring to our ports. Why should one bother to reduce easily correctible hazards of foreseeable injurious consequence when someone else will not only be liable for the damages suffered by the injured workman by either paying the shipowner total indemnity or by paying benefits under the Longshoremen's Act, but also for shipowners' defense expenses?

Furthermore, if public policy required that all liabilities for shipboard accidents be saddled upon the injured workmen's employers, and that shipowners be relieved of liability, Congress would have accomplished such result

within the framework and under the philosophy of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 901 *et seq.*) which keeps stevedore loss costs at the minimum amount consistent with seeing to it that the bulk of such cost goes directly toward adequately and speedily benefiting and rehabilitating the injured person. (See e.g. *New York Central R. Co.* v. *White*, 243 U. S. 188, 37 S. Ct. 247, 61 L. Ed. 666.) Here, under the Court of Appeals ordering of things, the Plaintiff gets the least portion of the charge upon the Stevedore which in turn pays a great deal more than if it were directly liable at law to Plaintiff. Insight into the realities makes it apparent that only a small portion of the over $9,000 the Stevedore is being called upon to pay will find its way into Plaintiff's pocket. In fact, that portion may be so small that the Stevedore will have to pay Plaintiff additional compensation benefits to bring his personal net recovery up to the amount he would have received under the Longshoremen's Act (33 U.S.C. § 933) had he not sued the Shipowner. In short, stevedore costs multiply but injured workmen obtain no benefit thereby.

In the *Ryan* case a stevedore was not permitted to use the Longshoreman's Act as a shield against the indemnity claim of a faultless shipowner held liable because the stevedore's wrongful conduct created the condition which subjected the shipowner to liability to the one injured. It is not an attack upon *Ryan's* concepts to say the dissent in *Ryan* would be well taken here, for this Stevedore has been left with less than it had before the Longshoremen's Act (33 U.S.C. 901 *et seq.*) was enacted.

Under that Act this Stevedore became absolutely liable to Plaintiff regardless of the fact that Shipowner's and Plaintiff's negligence caused the injury. In return, Stevedore was supposed to be immunized from suit by Plaintiff. This immunity turns out to be detrimental rather than beneficial, for if sued and held liable to Plaintiff, Stevedore could have recovered indemnity in full from Shipowner

(*Mowbray* v. *Merryweather, supra; The No. 34, supra*). Under the view of the law below, the Act's effect has taken an anomalous and strange turn. By preventing Plaintiff's suit against Stevedore, it cuts off Stevedore's indemnity right against Shipowner. In exchange, Stevedore is made to indemnify Shipowner for the Shipowner's wrongs despite its innocence *vis-à-vis* Shipowner.

Thus, from the Stevedore's point of view, the Act has not stabilized its liability, it has not given it the protection promised and it has not even allowed it to retain the rights against third parties which it had before it was given immunity.

Shipowners, while sacrificing nothing under it have become the real beneficiaries of the Act.

(B) If Stevedore in order to protect its indemnity rights was required to assert a cross-complaint (see, *Pettus* v. *Grace Line, supra*), it did cross-complain against Charterer on the basis of the charter agreement on the ground that Charterer, acting through Shipowner, breached its undertakings to supply and maintain the instrumentality in good order. Of course Charterer could then turn around and obtain indemnity from Shipowner. It therefore seems that needless circuity would be eliminated by denying Shipowner's indemnity claim. The parties would thus remain in their required positions and waste effort and expenses would be eliminated (Cf. *Waterman S. S. Corp.* v. *Dugan & McNamara, supra*).*

II

Inasmuch as the comprehensive written stevedoring contract expressly provided for indemnity rights in the event of personal injury damage claims or suits, resort to other

* It is apparent that the reason there are not a multitude of cases awarding indemnity to Stevedores against Shipowners upon *Mowbray's* principles is that the enactment of the Longshoremen's Act and other Workmen's Compensation statutes did away with the need for the development of the indemnity principle in that direction.

parts of the contract to imply a right of indemnification to Shipowner should not be permitted.

In this regard it is no more material to consider whether or not Shipowner would be entitled to indemnity under the express indemnity provision than it would be to consider whether the indemnity provided for therein would be more or less favorable to the Shipowner than *Ryan* would have allowed. The point is that the express agreement sought to and did settle all indemnity rights arising out of the work to be performed. Since it specifically took into consideration the subject matter of indemnity under elementary principles of contract law (*Teamsters Local* v. *Lucas Flour Co.*, 369 U. S. 95, 105, 82 S. Ct: 571), implied indemnity rights may not be written into the contract.

Any other result would in effect make express contractual undertakings to indemnify illusory and meaningless for, if under *Ryan* a shipowner could obtain greater benefits than given in the express agreement he would claim away from the agreement, but if *Ryan* gave him less he would claim under the agreement. This would also apply to a stevedore's actions. If an express agreement made a stevedore a shipowner's insurer, or in some way fastened liability upon it beyond that which *Ryan* would allow, the stevedore would disavow the indemnity provision; but, if it indemnified the shipowner at some point short of what *Ryan* would allow, the stevedore would insist that it controlled.

The rule of law thus fashioned would be that either party could unilaterally declare an expressly bargained for and agreed upon indemnity understanding to be a nullity and by this simple means rewrite the contract without the other parties accord to the revision.

It would seem that the Court of Appeals in *D'Agosta* v. *Royal Netherlands Steamship Co.*, 2 Cir. 301 F. 2d 105 (1962), had previously agreed with Stevedore's position here when it said:

> (301 F. 2d 107) "Maude contends here, as it did below, that the existence of this express indemnity

agreement precludes an action for indemnity on an implied warranty.

• • •

"We agree with appellant that an action on an implied warranty cannot be maintained in this case because of the existence of the express indemnity provision. *Dery* v. *Wyer*, 2d Cir. 1959, 265 F. 2d 804; *Foster* v. *Pennsylvania R. Co.*, 3d Cir. 1953, 201 F. 2d 727

Has the Court of Appeals now said that it has adopted another double standard in stevedore-shipowner relations which gives express indemnity provisions meaning only when they favor Shipowners?

The *Ryan* case specifically equates a stevedore's obligation to save a shipowner hafmless because of the stevedore's substandard work performance with "either • • • a bond of indemnity, or the contractor's own agreement to save the shipowner harmless" (350 U. S. 130), when the stevedoring contract does not contain an express agreement to indemnify or hold harmless, but it does not allow for the substitution of implied indemnity where express indemnity has been incorporated into the agreement.

And, *American Stevedoring, Inc.* v. *Porello*, 330 U. S. 446; 67 S. Ct. 847, 91 L. Ed. 1011, and *Lobue* v. *United States*, 188 F. 2d 800, hold the parties solely to their indemnity agreement regardless of what rights may have otherwise prevailed in its absence.

In *Dery* v. *Wyer*, 2d Cir. 1959, 265 F. 2d 804 and *Wanser* v. *Long Island R.R.*, 2d Cir., 238 F. 2d 467, the agreement between the parties called for contribution. Therefore, claims for full indemnity were denied because allowing them would have given to the third-party plaintiffs greater rights than that which the contract called for.

The only difference between this case and the cited cases is that the "who" is to obtain indemnity has replaced the "how" it is to be accorded.

The principles heretofore stated do not change and may not be avoided by saying that the Shipowner is not within the class mentioned in the express indemnity provision. If it is not included, it becomes apparent that the parties to the contract did not intend to grant Shipowner indemnity rights, be they express or implied, under the contract, for they comprehensively listed either by name or description all those whom Stevedore was to indemnify. On the other hand, if the Shipowner is one within the class for which the News was handling paper and is therefore to be indemnified by the Stevedore, the Shipowner is prohibited from seeking indemnity by implication under some other part of the agreement.

The Shipowner, claiming to be a third-party beneficiary of this very stevedoring contract, cannot at one and the same time both seek indemnity under it and avoid or disregard its specific express dominion over that subject. The Shipowner must take the contract as it finds it. It cannot rewrite it to its own satisfaction, or to merely suit its own whims. Since any indemnity rights under the contract exist only under the clause expressly providing therefor or they do not exist at all, the Shipowner may not obtain an indemnity recovery here. Having chosen to expressly reject any rights under the express indemnity provisions without the consent or acquiescence of the Stevedore in such rejection, the Shipowner's indemnity award was improperly predicated upon other assumed contractual provisions.

CONCLUSION

To set right the miscarriage of justice below resulting from an erroneous view or disregard of the concepts embodied in the Supreme Court's prior opinions on the subject of maritime law indemnity claims by Shipowners against Employers that will adversely affect a large percentage of the cases pending before Courts in vessel port of call districts and circuits, petitioner prays that a writ of certiorari be granted and/or that this Honorable Court summarily reverse the Court below.

Dated: New York, New York, September , 1962.

Respectfully submitted,

JOSEPH M. SOVIERO,
Attorney for Petitioner.

RAYMOND C. GREEN,
HARRY SCHECHTER,
HAROLD KLEIN,
On the Petition.

APPENDIX TO PETITION

Opinion of Zavatt, D. J.

UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF NEW YORK.

FRANK DRAGO,
Plaintiff,

against

A/S INGER,
Defendant.

A/S INGER,
Third-Party Plaintiff,

against

DANIELS & KENNEDY, INC., and
ILLINOIS ATLANTIC CORP.,
Third-Party Defendants.

May 31, 1961

APPEARANCES:

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Opinion of Zavatt, D. J.

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ZAVATT, D.J.

The plaintiff, Frank Drago, is a longshoreman employed by the third-party defendant, Daniels & Kennedy, Inc., a stevedoring company. On January 4, 1956 he was aboard the S. S. ELIN HOPE (owned by the defendant and third-party plaintiff A/S Inger) which was tied up to a pier at the foot of Dikeman Street, Brooklyn, New York. He was working aboard this vessel as a winchman and, in that capacity, had been operating the starboard steam winch at hatch No. 2. Immediately before the plaintiff left the vessel to go to lunch, he turned off the winch steam. Upon his return from lunch he started up the steam again and thereafter left it unattended and walked over to hatch No. 1 where he was directed by his hatch boss, another employee of the stevedoring company, to cut off the winch until "the Number 1 hatch caught up." In the process of cutting off the steam to this winch his foot was crushed by the moving piston. On the trial to the court and a jury the plaintiff and his witnesses testified that there was grease and oil on the deck in the vincinity of this winch; that it had spilled on the deck when an employee of the vessel greased the winch and applied oil to its moving parts at various times that morning and that oil had also spurted on the deck from the winch while it was operating. The plaintiff claimed that he slipped on this grease and oil as he was approaching the winch for the purpose of cutting off the steam and that, when he slipped, his foot

came to rest in the area over which the piston moved; his body struck the operating lever of the winch, thereby activating the piston which crushed his foot. He claimed further, that a safety device, a pin, designed to keep the lever in neutral, was missing from the winch; that he had placed a piece of wood under the lever to hold it in neutral position while he left the winch to walk over to No. 1 hatch and, that as his body struck the lever the piece of wood was dislodged, the lever went down and thereby activiated the piston. He sought to recover against the defendant on the theories of unseaworthiness and negligence. The defendant, owner of the yessel, impleaded the stevedoring company, Daniels & Kennedy, and the time charterer, Illinois Atlantic Corp. Only the claims of the plaintiff against the defendant were tried to the court and jury, the parties having stipulated that the claim over against the impleaded defendants would await the outcome of the jury's verdict and any issues that remained would be determined by the court. The court submitted to the jury, pursuant to Rule 49(b) of the Rules of Civil Procedure, written interrogatories which were answered by the jury as follows:

1. Do you find for the plaintiff on the ground that the ship was unseaworthy? NO.

2. Do you find for the plaintiff on the ground that the defendant was negligent? YES.

3. Did you reduce the plaintiff's damages because of his contributory negligence? YES.

If so, by what percentage? 75%.

The jury returned a verdict for the plaintiff against the defendant in the sum of $4500. Thereafter, the third-party claim of Inger against Daniels & Kennedy and Illinois Atlantic was tried to the court without a jury.

The vessel had completed a voyage from Canada where it had taken on large quantities of paper purchased by The News Syndicate, Inc. (not a party to this action.) The News engaged Daniels & Kennedy to unload the cargo in keeping with their blanket stevedoring agreement dated April 3, 1952. The time charter between Inger and Illinois Atlantic, dated January 30, 1950, was in full force and effect on the date of the accident. It is in the form of a New York Produce Exchange Government Time Charter and provides, inter alia: "Charterers are to load, stow, and trim the cargo at their expense under the supervision of the Captain." At the trial, Illinois Atlantic conceded that this provision contemplated not only loading but also discharging cargo, so that under that agreement Illinois Atlantic had the obligation to unload. Nevertheless, Illinois Atlantic did not discharge the cargo itself nor did it directly engage anyone to do so in its behalf. Rather, The News as consignee engaged Daniels & Kennedy to discharge the cargo.

The paper which was transported from Canada to Brooklyn aboard the vessel, under a bill of lading signed by the master, had been purchased by The News from Quebec North Shore Paper Co. North Shore had entered into a "contract of affreightment" with Illinois Atlantic, the time charterer, dated January 5, 1950 and in full force and effect on the date of the accident. Under that agreement the shipper, North Shore, was required to load and stow the cargo aboard the vessel in Canada. The agreement contemplated that the consignee, The News, although not a party to that agreement, would discharge the cargo at its own expense. Presumably, under the purchase and sale agreement between North Shore and The News, the seller's obligations so far as delivery was concerned ended when the cargo was loaded aboard the vessel thus casting on the purchaser, The News, the burden of unloading its own cargo.

THE JURY'S VERDICT

The jury's verdict, though supplemented by its answers to the interrogatories, is somewhat ambiguous. For example, the exact manner in which the shipowner and the longshoreman were negligent is not specified. While these specifications are not necessary for the verdict in the suit by the longshoreman against the shipowner, they may be material to the shipowner's claim for indemnity asserted against both the time charterer and the stevedore. See *Weyerhaeuser S.S. Co. v. Nacirema Operating Co.*, 78 S. Ct. 438 (1958). Therefore, in order to resolve the third-party aspects being tried to the court alone, the court must make additional findings of fact which must not be inconsistent with the findings expressed in the jury's answers to the interrogatories or necessarily implied in the jury's verdict in the primary suit. See *Weyerhaeuser S.S. Co. v. Nacirema Operating Co., supra.*

The plaintiff's legal theories of negligence and unseaworthiness were premised on common factual allegations: that the deck was covered with grease and oil and that the safety pin for the operating handle of the winch was missing. While the jury's verdict is ambiguous, it seems clear to me in light of their finding that the plaintiff was contributorily negligent to the degree of seventy-five per cent, that the jury rejected plaintiff's evidence and argument that there was grease and oil on the deck; that he slipped thereon; that his foot came to rest as he claimed; that he fell over the lever as he claimed. Rather, the answers to the interrogatories and the general verdict returned indicate that the jury accepted the defendant's theory of the accident, *i. e.*, that (1) when the plaintiff was told to close off his steam he stood up on the piston rod and leaned over the operating handle in order to reach the steam valve on the opposite side of the winch; (2) that proper procedure and due care called for the plaintiff to walk around his

winch, in order to reach the shut-off valve; (3) that in leaning over the winch plaintiff lost his balance, slipped, depressed the operating handle with his body as he fell, and thereby activated the piston which crushed his toes because he had placed his foot on the piston rod in the first place. (4) Implicit in the jury's finding of negligence on the part of the ship owner is a finding that the shipowner did not provide a safety pin which, if provided and used, would have avoided the accident.

I am convinced that this is what the jury determined. In any event, such findings are not inconsistent with their answers and their verdict. As I must make additional findings, those are the findings that I make. One further refinement may be necessary: did the shipowner, through its employees, know that the safety pin was missing, or was the shipowner negligent in that it should have known? The plaintiff testified that he told no one about the missing pin. Some further evidence on this point was provided by the second mate, Sverre Johnsen, who testified that at all times the pin was hanging from a metal chain on the winch. The jury evidently disbelieved Johnsen, but it is a big jump from disbelief of the presence of the pin to a finding that Johnsen, and therefore the shipowner, affirmatively knew that the pin was missing and chose to do nothing about it. (1) I find that the pin was missing; that it is more reasonable that Johnsen did not know of the missing pin and that the shipowner's negligence lay in not correcting a dangerous condition that it reasonably should have discovered.

Legal Theories of the Parties

The shipowner has sued over against the time charterer and the stevedore. The shipowner's theory against the charterer is that under the charter party the charterer assumed the obligation to unload the vessel and that implied in that undertaking is the promise that the unloading would

be done safely and that for the breach of that promise the charterer would indemnify the shipowner for any losses suffered by the latter.

The shipowner's theory against the stevedore is that the stevedore warranted that it would accomplish its expert, professional services in a workmanlike manner and indemnify for any loss occasioned by the breach of that warranty. This warranty is implied in the following covenant:

> "The Contractor will provide all necessary labor and services to discharge . . . paper from ships . . . in a prompt and efficient manner."

Although the stevedore was hired by the consignee of the cargo rather than by the shipowner and, therefore, there was not the contractual privity between shipowner and stevedore that there is between shipowner and charterer, the shipowner argues that it is the third-party beneficiary of that warranty and its attendant indemnity provision.

The third-party defendants, the charterer and the stevedore, have of course cross-claimed against each other seeking indemnity should the shipowner be successful in its suit. The charterer's basis for recovery is an indemnity provision in the stevedoring agreement entered into between the consignee of the cargo and the stevedore. By the terms of that agreement, the stevedore promised to indemnify the consignee and its "subsidiary and affiliated companies." The charterer asserts that it is such a company.

For its part the stevedore makes general allegations that, if it is required to indemnify the shipowner, it will be because of the primary negligence of the charterer and therefore under the common law theory of primary-secondary wrongdoing it would be entitled to be indemnified by the charterer.

Having set forth the claims and contentions of the parties, it is possible to simplify their analysis. It will be

seen that the shipowner's basic grievance is with the stevedore as the party actively engaged in unloading the vessel. Under the shipowner's theory the liability of the charterer is derivative in the sense that the charterer's liability depends on a finding that the independent contractor, engaged to discharge the obligation of the charterer under the charter party, did not do its job in conformity with its undertaking. It seems preferable therefore to discuss the claim of the shipowner against the stevedore first and leave for later consideration the liability of the charterer.

SHIPOWNER V. STEVEDORE

Under the principles announced by the Supreme Court in *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.*, 76 S. Ct. 232 (1956), and subsequently explained and expanded by the Court, a stevedore warrants to a shipowner that it will do its job in a workmanlike manner and with reasonable safety and that any loss resulting from breach of this warranty will be borne by the stevedore. In *Ryan*, the shipowner hired the stevedore but the parties did not execute a formal contract. What agreement they did have was to be found in letters which contained neither an express undertaking by the stevedore to do the work safely nor a promise to indemnify for a failure to do so. Nevertheless, the Court found the intent of the parties to encompass such an undertaking, characterizing this implied-in-fact warranty as the "essence" of the agreement and compared it to the warranty of a manufacturer that its product is sound. In *Crumady* v. *The Joachim Hendrik Fisser*, 79 S. Ct. 445 (1959), there was a formal contract between the charterer and the stevedore in which the stevedore promised "to faithfully furnish such stevedoring services." The Court said that the shipowner was the third-party beneficiary of the warranty of workmanlike service contained in that covenant and the right to in-

demnity as an incident of the warranty. Most recently in *Waterman S.S. Corp.* v. *Dugan & McNamara*, 81 S. Ct. 200 (1960), the stevedore had been hired by the consignee. The terms of the contract are not specified[1] in the Court's opinion which treats the case as controlled by *Ryan* and *Crumady* and designates the shipowner as the third-party beneficiary of the contract between the consignee and the stevedore.

Has the stevedore breached its warranty?

Although the stevedore's obligations are contractual, the determination of whether the stevedore has breached its warranty is generally made by reference to the law of torts.[2] Negligence on the part of the stevedore has been held without exception to constitute a breach of its warranty. Therefore, the question can be conveniently put in terms of whether the stevedore was negligent, although a negative answer would not necessarily be determinative because breach of warranty is a broader term than negligence.[3]

The earlier cases gave some support to the contention that the warranty extended only to the handling of cargo. But in *Waterman* the Court surveyed its prior opinions and said:

> This warranty of workmanlike service extends to the handling of cargo, as in Ryan, as well as to the use

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[1] The specific terms of the contract were not relied upon by the shipowner in the proceedings below. See 272 F. 2d 823 at 825 n. 1 (3d Cir. 1959).

[2] *Cf. Ryan* at 237. "The shipowner's action is not changed from one for a breach of contract to one for a tort simply because recovery may turn upon the standard of the performance of petitioner's stevedoring service."

[3] See *Booth S. S. Co.* v. *Meier & Oelhof Co.*, 262 F. 2d 310 (2d Cir. 1958). This seems to be the only case in which a shipowner was allowed indemnity in the teeth of a finding that the contractor was not negligent. The contractor in that case was a ship's mechanic and not a stevedore.

> of equipment incidental to cargo handling as in Weyerhaeuser. . . . This warranty may be breached when the stevedore's negligence does not more than call into play the vessel's unseaworthiness. Crumady. . . .

81 S. Ct. a. 201. In *Crumady* the ship provided an unsafe winch-boom system, but it was the negligent manner in which the rig was actually used by the stevedore that triggered the accident. In this respect it is hard to distinguish our case from *Crumady*. However in *Crumady*, as in the generality of cases, the stevedore was found negligent via respondeat superior when longshoreman *A* negligently injured longshoreman *B*—both longshoremen being employees of the stevedore. Under such circumstances, the shipowner is generally liable to *B* either because *A's* negligence brought about the unseaworthy condition or brought into play unseaworthiness already existing. Often the shipowner is liable in negligence in addition to any liability for unseaworthiness.

In the instant case, it was the plaintiff's own negligence in conjunction with the negligence of the shipowner in failing to provide a safety pin that brought about the plaintiff's injury. In such a case, is the plaintiff's negligence in the manner in which he performed his job attributable to the stevedore so that that negligence operates to breach the stevedore's warranty. The stevedore has argued that the shipowner is not entitled to impute that negligence to the stevedore because the shipowner has already received a benefit from the finding of the plaintiff's negligence in that the plaintiff's recovery was reduced by seventy-five per cent. The stevedore also benefits because the plaintiff's recovery is the measure of the shipowner's loss and therefore the outer boundary of the stevedore's potential liability. The few cases that have

presented the opportunity to consider this point tend to support the stevedore's position. In *Trenkle* v. *Compagnie Generale Transatlantique*, 179 F. Supp. 795 (S. D. Calif. 1960), a longshoreman fell into a hatch when he lost his balance on a narrow passageway. The ship was unseaworthy in that there were no guard rails along the passageway. The shipowner contended that the longshoreman was not a suitable worker because as a former prize fighter he was punch drunk, or, in any event, that he negligently tripped over his own feet. The court thought that it would be a breach of the stevedore's warranty if it provided unsuitable longshoremen but found that this longshoreman was experienced and competent. It went on to hold that, even if the longshoreman were negligent in a manner that caused his injury, that would not be enough to fasten liability on the stevedore. In *Calderola* v. *Cunard S.S. Co.*, 279 F. 2d 475 (2d Cir. 1960), a longshoreman was injured when he slipped on grease on a ladder he was descending. He had discovered the grease a "moment or two" before on his trip up the ladder. The jury had found for the longshoreman against the shipowner on the theory that the grease rendered the ship unseaworthy. The trial court, sitting without a jury, then granted the shipowner indemnity from the stevedore. This latter judgment was reversed on appeal. The Court of Appeals held that the stevedore's warranty to perform its work with reasonable safety was not breached under the facts because the grease on the ladder was only a recent condition and "this knowledge acquired by the plaintiff so short a time before he slipped was insufficient to put the stevedore on notice of the condition and give it an opportunity to remove the grease or to have the ship's crew do so before the accident." 279 F. 2d at 478. It did not consider whether the longshoreman was contributorily negligent in coming down a ladder he knew was

greasy, or in the manner in which he descended,[4] and if he was, whether that negligence would be sufficient to constitute a breach of the stevedore's warranty to do its work with reasonable safety.

Having raised the problem of whether the injured longshoreman's own negligence is sufficient to constitute a breach of the stevedore's warranty, it is possible to finesse the problem via the dictum suggested by *Calderola*, i.e. that the stevedore has a duty to remedy, or have the ship's crew remedy, a dangerous condition that exists for a period sufficient for the stevedore to have constructive notice thereof.[5] The missing pin was a condition which existed, not for a few minutes, but from the time the longshoremen came aboard at about 8:00 A.M. to about 1:15 P.M. when the plaintiff was injured. Thus, the stevedore had constructive notice of the dangerous condition and its failure to correct it or have it corrected was negligence and a breach of its warranty of workmanlike service in that liability of the shipowner was a reasonably foreseeable consequence. See *Smith* v. *Jugoslavenska Linijska Plividea*, 278 F. 2d 176 (4th Cir. 1960); *Berti* v. *Compagnie de Navigation Cyprien Fabre*, 213 F. 2d 397 (2d Cir. 1954); *United States* v. *Arrow Stevedoring Co.*, 175 F. 2d 329 (9th Cir. 1949).

Does the shipowner's own negligence foreclose it from indemnity?

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[4] See *Santomarco* v. *United States*, 277 F. 2d 255 (2d Cir. 1960).

[5] This duty finds some support in the contract itself which contemplates "lost time" due to temporary suspensions or interruptions not due to the failure of the stevedore's own equipment. A complementary promise on the part of the shipowner to co-operate with the stevedore in keeping interruptions to a minimum has also been suggested. See *Hugev* v. *Dampskisaktieselskabet Int'l*, 170 F. Supp. 601, 611 (S. D. Calif. 1959), *aff'd per curiam sub nom. Metropolitan Stevedore Co.* v. *Dampskisaktieselskabet Int'l*, 274 F. 2d 875 (9th Cir.), *cert. denied*, 363 U. S. 803 (1960).

The shipowner's right to indemnity flows from a breach of the stevedore's contractual duty. As such, negligence on the part of the shipowner cannot have the usual effect that contributory negligence has in a suit based on the breach of a non-consensual duty. As the Supreme Court said in *Ryan:*

> Whatever may have been the respective obligations of the stevedoring contractor and of the shipowner to the injured longshoreman . . . it is clear that, as between themselves, the contractor, as the warrantor of its own services, cannot use the shipowner's failure to discover and correct the contractor's own breach of warranty as a defense.

76 S. Ct. at 238. Nor are concepts of active-passive negligence or primary-secondary fault helpful. See *Weyerhaeuser*, 78 S. Ct. at 442. However, The Supreme Court indicated that certain activity on the part of the shipowner may be such as to excuse performance on the part of the stevedore. It remains to examine the decisions to determine where the line has been drawn in order to see whether the shipowner's conduct here, in failing to provide a pin, will excuse the stevedore from its promise to indemnify the shipowner.

No case has been found where the shipowner has been denied indemnity because its own conduct was so gross as to excuse performance by the stevedore. Indemnity has of course been denied because the stevedore has not breached its warranty. The facts in the following cases suggest that the negligence of the shipowner in the instant case is well within permissible conduct so far as the right to indemnity is concerned.

In *Ryan* a longshoreman was injured when a roll of pulpboard he was helping to unload broke loose because it had been insufficiently secured when stowed. The trial court

found both the shipowner and the stevedore negligent in the manner in which the cargo was loaded and secured. "The trial judge found that the ship's officer present at the stowage 'did not properly perform his admitted duty to supervise the safe and careful loading of the vessel,' although he had 'authority to remedy the condition or halt the work'." 76 S. Ct. at 240 (dissenting opinion of Black, J., quoting from 111 F. Supp. 505, 507).

In *Weyerhaeuser* a longshoreman was injured when a board from a temporary winch shelter fell on him. The shelter had been erected by an employee of the stevedore in New York but not dismantled before the ship sailed to Boston where the injury occurred. The jury's verdict for the plaintiff established the shipowner's negligence but the general verdict was necessarily ambiguous and the specification of negligence was in doubt. In sending the case back for a more specific finding the Court said:

> While the jury found [shipowner] "guilty of some act of negligence", that ultimate finding might have been predicated, inter alia, on the failure of [shipowner] to remove the shelter when the ship left New York, or a failure to correct or warn [stevedore] of a latent dangerous condition known to [shipowner] when [stevedore] began the Boston unloading. Likewise, the finding might have been predicated on a failure of [shipowner] during the five days in Boston to inspect the shelter, detect and correct the unsafe condition. Although any of these possibilities could provide the [longshoreman] a basis of recovery, at least the latter would not, under *Ryan*, prevent recovery by [shipowner] in the third party action.

78 S. Ct. at 441.

In *Crumady* a longshoreman was injured when a topping-lift parted, causing the boom it supported to fall. The

wire rope that constituted the topping-lift was rated at three tons, which was also the safe working load of the boom. The winch around which the rope was wound had a cut-off device or circuit breaker set to shut off current when the stress on the wire rope was six tons—twice the safe working load of the hoisting device which the winch served. The circuit breaker had been "adjusted by those acting for the vessel owner."* The trial court concluded that the setting of the winch cut-off device at twice the safe-load rating rendered the vessel unseaworthy. But the court also found that the unskillful handling of the winch and the boom by the stevedore's employees—conduct which was both negligence and a breach of the stevedore's warranty of workmanlike service—created the stress in excess of six tons and thereby "brought into play" the unseaworthiness of the vessel. The trial court awarded the shipowner indemnity from the stevedore on the theory that the shipowner was the third-party beneficiary of the stevedore's warranty. This decision was subsequently affirmed by The Supreme Court.

In *Revel* v. *American Export Lines, Inc.*, 266 F. 2d 82 (4th Cir. 1959), a longshoreman was injured when a drum that was being loaded aboard the ship fell. A defective winch being operated by other longshoremen was the cause of the injury. The winch was ship's equipment. In fact it had been rigged by the ship's crew. The shipowner was negligent in failing to inspect the winch. The stevedore knew of the defect but continued to load the ship—conduct

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* 79 S. Ct. at 48. The quoted language implies that the device was set by the ship's crew and at least one court in discussing the facts of *Crumady* so states. See 266 F. 2d at 80. The trial court in *Crumady* in a long opinion in which very close attention is paid to facts nowhere says that the device had been set by the crew. Indeed, it is possible to infer that the device was set by the original manufacturer when it was installed in June, 1952, and that the crew made no change in the setting of the device between that date and January 2, 1954, the date of the accident, although a ship's surveyor had inspected the gear in the interim.

which breached its warranty. The shipowner was allowed indemnity.

In *Calmar S. S. Corp.* v. *Nacirema Operating Co.*, 266 F. 2d 79 (4th Cir.), *cert. denied*, 80 S. Ct. 56 (1959), a longshoreman was injured while working in the hold when one of his fellow employees threw a cargo light into the hold. The light had not been properly "seized", from which the jury concluded that the ship was unseaworthy and the shipowner negligent. The jury also found the stevedore negligent in using the light in its defective condition and in the manner in which the light was thrown into the hold. By contract the shipowner was obligated to supply cargo lights which the trial court interpreted to mean reasonably safe lights and on the finding of the jury concluded that the shipowner had breached its contract with the stevedore and therefore the court denied indemnity to the shipowner although the stevedore was found to have also breached its warranty of workmanlike service. The Court of Appeals reversed and entered judgment for the shipowner. In summation that court said:

> In determining whether the action of Calmar were such as to bar recovery, we must necessarily compare them to those of the owner in Crumady. Here, the ship did not inspect the light and did not provide seizing. In Crumady the ship's crew supplied a cut-off device which they had set at twice the rated limit of the rigging. Certainly supplying the defective cut-off device was no less a contractual violation there than the supplying of the unseized cargo light here. If the former did not preclude recovery, then, under the principle announced in Crumady, we think the latter should not.

266 F. 2d at 81.

It has been a source of concern that the obligations of the shipowner and the stevedore are not mutually identical.

This lack of symmetry has been often commented on, but I think no one has put the matter in better perspective than Judge Mathes in *Huger* v. *Dampskisaktieselskabet Int'l*, 170 F. Supp. 601 (S. D. Calif. 1959). Judge Mathes said:

> In almost every instance, when a stevedoring contractor commences the work of loading or unloading a seagoing vessel, the ship has arrived in port only a few hours before. She may have been at sea for weeks or months. Almost always, she has ridden some heavy seas. Often she may have rolled and pitched through mountainous seas for days, taken thousands of tons of water over her decks, sailed through freezing and tropical weather, and been beaten by 100 mile an hour gales. Almost surely she will have been serviced by stevedores of varying degrees of competency in other parts throughout the world.
>
> Being a mass of plates, pipes, wires, beams and various mechanisms, each to some degree vulnerable to the elements, it would be much too much to expect a cargo vessel to arrive in port with all equipment, appliances and facilities in a fully seaworthy condition. Especially is this true with respect to the hatches, booms and winches, which are relatively more likely to be in disorder because of the elements, and the abuse and misuse of men as well. It is reasonable to expect, then, that many things may be wrong with a freighter and her equipment when she arrives in port; that she may well be a place of danger even as she docks. And all of these lurking dangers may be due entirely to the hazards of the ship's service.
>
> The stevedoring contractor knows that the ship has been at sea; that she may be in many respects dangerous to the life and limb of an unskilled person; that if a condition is found which is unsafe for the professional longshoreman, as a rule the contractor

> can remedy it at the expense of the shipowner; that if the stevedoring operations are thereby delayed, the shipowner normally must pay for standby time.
>
> Stevedoring contractors hold themselves out as being trained and equipped to cope with these conditions and these dangers. To this end, the stevedoring contractor is usually given full use and charge of the ship's loading and unloading equipment and appliances and the cargo hatches and holds. So it is that the stevedoring contractor cannot reasonably expect, and does not expect, to board a vessel which in all respects, as to equipment and appliances as well as hull, is in a seaworthy condition, or even in a reasonably safe condition. . . .

170 F. Supp. at 609-10.

Do the express provisions of the stevedoring contract negative these implied warranties?.

What has been said up to now assumed that the provisions of the stevedoring contract were silent on the subject of indemnity. But that is not the case here. Therefore, the conclusion reached that the shipowner would be entitled to indemnity upon theories of implied-in-fact indemnity must be tested by the particular provisions of the applicable agreement. The stevedore was hired by the consignee of the cargo. The contract between the stevedore and the consignee contained not only the general language from which courts have implied the warranty of workmanlike service—"The Contractor will provide all necessary labor and services to discharge . . . paper from ships . . . in a prompt and efficient manner"—but also a specific indemnity provision:

> The Contractor agrees to indemnify and hold harmless The News and its subsidiary and affiliated companies as well as any other persons and companies for

> which The News may be handling paper against any and all personal injury or property damage claims or suits, and any loss, cost or damage in connection therewith which may be asserted or maintained by any person . . . which is not a party to this agreement and which may arise in connection with or result from the operations to be carried on by the Contractor under this agreement.

Under the reasoning of *Crumady* and *Waterman*, the shipowner is the third-party beneficiary of an implied warranty of workmanlike service and any promise to indemnify that accompanied that warranty. But the shipowner here, after setting up a claim in its original third-party complaint that it is a third-party beneficiary of the express promise to indemnify just quoted, now chooses to rely entirely on an implied promise to indemnify flowing from the undertaking of the stevedore to do work "in a prompt and efficient manner." The stevedore argues that the entire intention of the parties is contained in the express indemnity provision and, expressio unius est exclusio alterius, no other indemnity provision may be implied.

Assuming that the shipowner is the third-party beneficiary of that express promise to indemnify as it would be of any implied promise, it is clear that the shipowner has raised certain theoretical problems by its refusal to rely on that express right. Therefore, before going too far afield it will do well to examine the assumption just made, *viz.*, that the shipowner is a third-party beneficiary of the express promise. While the shipowner is not specified as a beneficiary of the stevedore's promise to indemnify, two other classes are: (1) affiliates and subsidiaries of the consignee-promisee; (2) persons for whom the consignee is handling the cargo of paper. It would seem, therefore expressio unius est exclusio alterius—that the parties to the contract did not intend to make the ship-

owner a beneficiary of this specific indemnity clause. The shipowner arguably was not meant to be the beneficiary of this clause of the contract because it was already the beneficiary of the implied-in-fact promise of the stevedore to indemnify for breach of its implied-in-fact warranty to do its work "in a prompt and efficient manner." Cf. *Royal Mail Lines, Ltd.* v. *Peck*, 269 F. 2d 857 (9th Cir. 1959). In *Oleszuk* v. *Calmar S. S. Corp.*, 164 F. Supp. 628 (D. Md. 1958), *rev'd on other grounds sub nom. Calmar S. S. Corp.* v. *Nacirema Operating Co.*, 266 F. 2d 79 (4th Cir. 1959), the contract between the shipowner and the stevedore provided: "The [stevedore] will be responsible for loss or damage to the ship, its equipment and the cargo through or as a result of negligence." 164 F. Supp. at 632. A longshoreman had been injured because of the combined negligence of the shipowner and the stevedore. On the shipowner's claim for indemnity the stevedore made an "expressio unius" argument, *i.e.*, having agreed to indemnify the shipowner for certain losses, no further agreement to indemnify the shipowner could be implied. The trial court rejected the argument concluding "from the examination of the entire contract . . . that the quoted clause was not intended to eliminate the implied obligation of the contractor to indemnify the operator against 'foreseeable damages resulting to the shipowner . . . from the contractor's improper performance'." *Id.* at 633. This issue was not discussed by the Court of Appeals.

The stevedore argues here that to look anywhere else than the express indemnity provision for a promise to indemnify would alter the intention of the parties and cast a burden different in scope upon the stevedore than that bargained for. The theory of the *Ryan* case is that the liability of the stevedore is a consensual act—a contract implied-in-fact—rather than an obligation imposed by law. It would follow that this obligation could be altered by

agreement. *Ryan*, of course, involved a situation where the stevedore was hired by the shipowner and therefore there was privity between them. In our case the stevedore is removed from the shipowner by a time charterer and a consignee. It is therefore not certain how the contract between the consignee and the stevedore could limit the rights that the shipowner has under the *Ryan* case as interpreted in *Crumady* and *Waterman*.

But that difficulty is not presented here because the contract does not seek to limit those rights. The stevedore expressly covenanted with the consignee to do its work "in a prompt and efficient manner." The shipowner is a third-party beneficiary of that promise. The stevedore also promised to indemnify the consignee and two other named classes "against any and all personal injury or property damage claims or suits, and any loss, cost or damage . . . which may arise in connection with . . . the operations to be carried on by the Contractor." Although this express promise to indemnify does not expressly cover a loss caused in part by the negligence of the consignee of the promise to do so has been implied where the only liability of the promisee (the consignee) in the first instance could be based on negligence. See *Rice* v. *Pennsylvania R.R.*, 202 F. 2d 861 (2d Cir. 1953); *A/S J. Ludwig Mowinckels Rederi* v. *Com'l Stevedoring Co.*, 256 F. 2d 227 (2d Cir. 1958); *Porello* v. *United States*, 94 F. Supp. 952 (S.D.N.Y. 1950). This is true even though as a general rule indemnity provisions will not be construed to cover the negligence of the indemnitee. See *American Stevedores, Inc.* v. *Porello*, 67 S. Ct. 847 (1947); *Rice* v. *Pennsylvania R.R.*, *supra*. We have already seen that the shipowner's negligence does not defeat its right to indemnity under an implied contract. Thus it would seem that there is no inconsistency between the right to indemnity that is an adjunct of the implied warranty of workmanlike service

and the express warranty contained in the contract in this case. Therefore no inference can be drawn that the stevedore bargained for a limitation of its liability.

Does indemnity include attorneys' fees?

As part of its claim the shipowner seeks a reimbursement for the fees expended in the defense of the longshoreman's action. The parties have stipulated that the reasonable value of these services is $3,000 for attorneys and an additional $1,500 for expenses and disbursements. The authorities now recognize that the indemnitee has a right to these fees. See *A/S J. Ludwig Mowinckels Rederi* v. *Com'l Stevedoring Co.*, 256 F. 2d 227, 232 (2d Cir. 1958); *Shannon* v. *United States*, 235 F. 2d 457, 459 (2d Cir. 1956); *Gonzales* v. *Pennsylvania R.R.*, 183 F. Supp. 779, 781 (S.D.N.Y. 1960); *Holley* v. *The Manfred Stansfield*, 186 F. Supp. 805, 809 (E. D. Va. 1960); *Lilleberg* v. *Pacific Far East Line, Inc.*, 167 F. Supp. 3, 5 (N. D. Calif. 1958). In *Holley* the court said: "It is now fairly well settled that an indemnitee may recover attorney's fees and expenses from an indemnitor under either an express or implied contract of indemnity." 186 F. Supp. at 811.

SHIPOWNER v. CHARTERER

Having determined that the shipowner is entitled to indemnity from the stevedore we return to the question put to one side earlier: Is the shipowner entitled to indemnity from the charterer? The shipowner claims that the charterer's obligation under the charter party to load and unload the vessel included the warranty that it would the job safely and indemnify the shipowner for any loss occasioned by the breach. The charterer denies that any such warranty is to be implied. Rather, it asserts, that under the charter the shipowner warranted to it that the ship was fit and undertook to maintain the ship and its equip-

ment in an efficient state. In effect, the charterer argues that the failure of the shipowner to provide a safety pin for the winch was a breach of the shipowner's covenant to maintain and that the shipowner is under a duty to indemnify the charterer should it suffer any loss due to the shipowner's breach.

The shipowner's chief support for its position is *Revel* v. *American Export Lines, Inc.*, 162 F. Supp. 279 (E. D. Va. 1958), *aff'd*, 265 F. 2d 82 (4th Cir. 1959). In that case the shipowner was allowed indemnity from the charterer under a provision wherein the charterer agreed to arrange for loading and discharge of cargo and covenanted that "the cargo shall be efficiently loaded on the vessel." That is broader than the charter covenant in the instant case, which is only that the charterer will bear the expense of loading and unloading, not that it will do the job "efficiently." Furthermore, the authority of that case is undermined in two important respects. First, the charterer in that case conceded that it had a duty to reimburse the shipowner for loss occasioned by inexpert stevedoring service. And second, *Revel* was decided before *Crumady* established that the shipowner is the third-party beneficiary of the stevedore's warranties to the charterer.

The shipowner seeks to apply to a shipowner-charterer relationship the reasoning of Ryan and its progeny, which have found a warranty of workmanlike service in the relationship of shipowner-stevedore. The stevedore's warranty arises because it holds itself out to do a job; that it is proficient in its work which, being done aboard a ship, is necessarily fraught with danger and therefore requires a degree of expertise. The charterer, on the other hand, makes no representation that it is either an expert seaman or an expert stevedore. Workmanlike service and reasonable safety on the part of the charterer are not the "es-

sence" of the charter as they are of a stevedoring contract.

A similar conclusion was reached in *Matson Navigation Co.* v. *United States*, 173 F. Supp. 562 (N. D. Calif. 1959). There the shipowner sought indemnity from the owner of the cargo. In that respect the cases are distinguishable because here the shipowner seeks to hold the time charterer. But the court's analysis is pertinent:

> "Ryan does not warrant a holding here that there was a contractual obligation on the part of the United States to indemnify Matson for any loss to Matson resulting from the improper handling by the United States of its own cargo. In Ryan, the Supreme Court stated that the stevedorng company's obligation to handle cargo properly and safely was a warranty of workmanlike service comparable to a manufacturer's warranty of the soundness of its product. In the present case, the United States did not offer its services to Matson as a professional stevedore. It merely contracted to assume the responsibility for the removal of its own cargo from Matson's vessel. This is too flimsy a predicate for a warranty of professional competence from which could be implied a contractual obligation to indemnify Matson for any damages it might be required to pay another as a result of improper handling by the United States of its cargo."

173 F. Supp. at 564.

Of course, a charterer may agree to assume the duty to indemnify and no doubt, under appropriate circumstances, that obligation may be implied as a fact. The intent of the parties is, of course, controlling and perhaps the concession of the charterer in *Revel* meant nothing more than that. But I find nothing in this case to support the con-

clusion that the parties here intended such a result.[7] Nor do I find any policy of the law that would require such an agreement to be implied against the intention of the charterer. Furthermore, the jury has found the shipowner negligent and the general rule is that no indemnity provision will be implied to cover one's own negligence. See *American Stevedores, Inc.* v. *Porello, supra.*

STEVEDORE v. CHARTERER

This lawsuit contemplated three possible stages. The first stage, longshoreman v. shipowner, ended with a verdict for the longshoreman. This opinion disposes of the second stage: shipowner v. charterer and stevedore. There remains the third stage: stevedore v. charterer. The cross-claim of the charterer against the stevedore has become academic in view of the fact that I have held that the charterer is not liable to the shipowner. And the stevedore's theory of indemnity from the charterer—the common law duty owed the secondary or passive tortfeasor by the primary or active tortfeasor—does not seem to accommodate the facts as found by the jury and the court.

In keeping with the sequence agreed upon, however, I will label this last conclusion "tentative" and schedule a

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[7] The charterer's contention that it is merely a lessee of space aboard the vessel is borne out in the following provisions of the charter wherein the owner covenants: "hull, machinery and equipment in a thoroughly efficient state"; "vessel on her delivery to be . . . in every way fitted for the service"; "to maintain her class and keep the vessel in a thoroughly efficient state in hull, machinery and equipment for and during the service"; "owners shall maintain the gear of the ship as fitted." Finally, "Nothing herein stated is to be construed as a demise of the vessel to the Time Charterers. The owners to remain responsible for the navigation, insurance, crew, and all other matters, same as when trading on her own account." See also Gilmore & Black, Admiralty 170 (1957); Poor, Charter Parties § 7 (4th ed. 1954).

date for a final hearing at which time any evidence bearing upon this cross-claim still outstanding may be offered and argument had.

This opinion constitutes the findings of fact and conclusions of law with reference to the claim of the third-party plaintiff against the third-party defendants. As to the cross-claim of Daniels and Kennedy against Illinois Atlantic these parties will confer with the court to set a date for a hearing. Settle an order, consistent with this opinion, on or before ten days from the date hereof.

JOSEPH C. ZAVATT
U. S. D. J.

Opinion of United States Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 247—September Term, 1961.

(Argued March 5, 1962 Decided July 3, 1962.)

Docket No. 27231

FRANK DRAGO,

Plaintiff-Appellee,

v.

A/S INGER,

Defendant and Third-Party Plaintiff-Appellee,

v.

DANIELS & KENNEDY, INC.,

Third-Party Defendant-Appellant,

and

ILLINOIS ATLANTIC CORP.,

Third-Party Defendant Appellee.

Before: LUMBARD, Chief Judge,
KAUFMAN and MARSHALL, Circuit Judges.

Opinion of United States Court of Appeals.

Appeal from the United States District Court for the Eastern District of New York, Joseph C. Zavatt, J., contesting a verdict and judgment of damages for personal injuries in favor of Frank Drago against A/S Inger, and a judgment of indemnity in favor of A/S Inger against appellant.

Both judgments affirmed.

WILLIAM A. WILSON, New York, N. Y. (Warner Pyne and Pyne, Smith & Wilson, on the brief), for defendant and third-party plaintiff-appellee.

RAYMOND C. GREEN, New York, N. Y. (Charles G. Tierney, Harry Schechter and Harold Klein, on the brief), for third-party defendant-appellant.

DAVID P. H. WATSON, New York, N. Y. (J. Ward O'Neill and Haight, Gardner, Poor & Havens, on the brief), for third-party defendant-appellee.

LUMBARD, Chief Judge:

This is an appeal from a judgment of indemnity awarded the third-party plaintiff shipowner, which had been found liable to the plaintiff longshoreman for his personal injuries, against the stevedoring company which employed the plaintiff in its unloading operations on the third-party plaintiff's ship. The stevedoring company contends on this appeal that the trial judge, in deciding on the third-party complaint without the jury pursuant to stipulation, erred in holding it liable because of its use of the defective winch which injured the plaintiff, and further contends that any implied duty of indemnity to the shipowner was precluded by inconsistent express language in the stevedoring contract and by the shipowner's negligence in supplying the

winch in defective condition. We find these contentions to be without merit, and in addition reject, without further discussion, certain insubstantial attacks which the stevedoring company makes on the basic judgment in favor of the longshoreman against the shipowner.

On January 4, 1956, the S.S. Elin Hope arrived at a pier at the foot of Dikeman Street in Brooklyn, N. Y. carrying a cargo of newsprint from Quebec consigned to News Syndicate, Inc. The ship was owned by A/S Inger, and operated by it under a time charter agreement with Illinois Atlantic Corp. At 8 a.m., shortly after the ship docked, gangs of longshoremen employed by Daniels & Kennedy, Inc., came aboard to unload the cargo. The plaintiff, Frank Drago, was the starboard winchman on the gang working at #2 hatch. Apparently the unloading proceeded without incident until 12 noon, when Drago shut off the steam at his winch and went to lunch. When he returned from lunch at 1:00 p.m., Drago again opened his steam valve, but shortly thereafter was told to shut down his winch until the gang working at #1 hatch caught up with his gang. While Drago was attempting to close the steam valve, he in some way fell on the operating handle, with the result that his left foot was crushed by the moving piston.

This diversity action was brought by Drago against the shipowner, A/S Inger, based upon theories of unseaworthiness and negligence. The shipowner impleaded the stevedoring company, Daniels & Kennedy, Inc. and the time charterer, Illinois Atlantic Corp., claiming indemnity from each, and each of the third-party defendants also cross-claimed against the other. The jury entered a verdict of $4,500 for the plaintiff against the shipowner, and in answer to special interrogatories stated that the ship had not been unseaworthy but the shipowner had been negligent, and that their award had been reduced by 75 per cent because of contributory negligence. The court then con-

sidered the indemnity claim and the cross-claims, dismissing the cross-claims and the indemnity claim against the time charterer and granting the indemnity claim of the shipowner against the stevedoring company. Although various notices of appeal were filed, the only appeals pursued here are those by the stevedoring company from the judgment against the defendant and the third-party judgment against itself. Since the appeal from the judgment against the defendant presents, as we have noted, no substantial issues, we are here concerned only with the stevedoring company's attacks on the court's award of indemnity to the shipowner.

In making the findings of fact necessary for the determination of the third-party claim, the trial judge properly interpreted the jury's verdict and answers to the special interrogatories so as to prevent inconsistency between the verdict and his disposition of the indemnity claim. On review of the record, we see no reason to regard his findings as "clearly erroneous." The judge found that

> "[T]he jury accepted the defendant's theory of the accident, i.e. that when the plaintiff was told to close off his steam he stood up on the piston rod and leaned over the operating handle in order to reach the steam valve on the opposite side of the winch; that proper procedure and due care called for the plaintiff to walk around his winch, in order to reach the shut-off valve; that in leaning over the winch plaintiff lost his balance, slipped, depressed the operating handle with his body as he fell, and thereby activated the piston which crushed his toes because he had placed his foot on the piston rod in the first place. Implicit in the jury's findings of negligence on the part of the shipowner is a finding that the shipowner did not provide a safety pin which, if provided and used, would have avoided the accident."

The judge found that the missing pin would, if inserted in the proper place, have locked the operating lever in a neutral position, and thus have prevented the activation of the piston. He concluded that "the shipowner's negligence lay in not correcting a dangerous condition that it reasonably should have discovered."

On the third-party claim, the judge decided that the stevedoring company must indemnify the shipowner because of its continued use of the winch without having the pin replaced. He held this to be a breach of its contractual "duty to remedy, or have the ship's crew remedy, a dangerous condition that exists for a period sufficient for the stevedore to have constructive notice thereof." He went on to make the findings of fact underlying this conclusion:

> "The missing pin was a condition which existed, not for a few minutes, but from the time the longshoremen came aboard at about 8:00 A. M. to about 1:15 P. M. when the plaintiff was injured. Thus the stevedore had constructive notice of the dangeraus condition and its failure to correct it or have it corrected was negligence and a breach of its warranty of workmanlike service in that liability of the shipowner was a reasonably foreseeable consequence."

In attacking the judgment against it, the appellant argues that the trial judge erred in deciding that under the contractual situation existing in this case a warranty of workmanlike service ran from it to the shipowner. The contract under which the stevedores worked was made not with the shipowner but with the consignee of the cargo, News Syndicate, Inc. Although the shipowner was thus not a party to the contract, the trial judge held that it enjoyed the normal warranty of workmanlike service as third-party beneficiary under the clause stating that "the Contractor will provide all necessary labor and services to

discharge, unload and handle paper from ships or barges *in a prompt and efficient manner.*" [Emphasis added.] We agree that such a clause creates such a warranty, *Weyerhaeuser S. S. Co.* v. *Nacirema Operating Co.*, 355 U. S. 563, 565 (1958), and that the warranty runs to the shipowner as third-party beneficiary, *Waterman S. S. Corp.* v. *Dugan & McNamara, Inc.*, 364 U. S. 421 (1960); cf. *Crumady* v. *The J. H. Fisser*, 358 U. S. 423, 428-29 (1959). Nor can there be any question, under the law laid down by the Supreme Court, that the warranty extends to the proper use of such equipment as winches. *Crumady* v. *The J. H. Fisser, supra.*

The appellants argue, however, that any such implied-in-fact warranty as would normally run in favor of the shipowner as third-party beneficiary is excluded by the presence in the contract of an express indemnity clause which does not mention the shipowner, but rather benefits only "The News and its subsidiary and affiliated companies as well as any other persons and companies for which The News may be handling paper." We do not agree. No further discussion is needed than the citation of our treatment of the same problem in our recent decision in *Pettus* v. *Grace Line, Inc.*, —— F. 2d ——, —— (2 Cir. 1962), where we held that in the absence of some express disavowal the normal implication of warranty from the terms of the contract is not contradicted.

As we have noted, we see no reason to reject the trial court's findings as to the underlying evidentiary facts relevant to the indemnity claim. We also accept his conclusion that the conduct of the stevedoring company in permitting the defective winch to be used for more than four working hours without making any effort to have it repaired fell short of that "workmanlike service" that it warranted to the shipowner. Since we accept the determination that the company was on notice of the absence of the pin, and had a

duty to have it replaced, we may avoid, as did the trial judge, considering whether the plaintiff's own negligence might be imputed to his employer as a basis for indemnity. It still remains, however, to consider the contention of the appellant that indemnity is barred by the fact that the deficiency which caused the injury was itself the product of the negligence of the shipowner in not properly repairing the ship's equipment.

The mere fact that the shipowner was at fault is obviously not in itself a bar to indemnity; the unworkmanlike service of the stevedoring company was responsible for bringing the defect into play and causing the injury, and this is normally sufficient basis for recovery over. *Crumady* v. *The J. H. Fisser*, 358 U. S. 423 (1959); *American Export Lines, Inc.* v. *Revel*, 266 F. 2d 82, 87 (4 Cir. 1959). Appellant argues, however, that the shipowner violated a contractual duty to the stevedores to supply them with proper winches. We need not complicate matters by investigating the consequences of the fact that there was no direct contractual relationship between the shipowner and the stevedoring company here; rather we shall assume that the stevedoring company was a third-party beneficiary of the shipowner's undertaking in the time charter to "keep the vessel in a thoroughly efficient state in hull, machinery and equipment" and can take advantage of the contractual defenses normally available to a stevedore who has contracted directly with the shipowner. Even if this assumption is made, we reject the appellant's contractual defenses. As we have recently held in *Pettus* v. *Grace Line, Inc., supra*, a shipowner's breach of contract in failing to supply adequate equipment to its stevedores is not sufficiently material to excuse the stevedores from the contractual duty to give proper service on which the indemnity claim is here based. The cases cited to us by the appellant dealing with the warranties of professional suppliers of equipment, e.g.,

Booth S. S. Co. v. *Meier & Oelhaf Co.*, 262 F. 2d 310 (2 Cir. 1958), are wholly irrelevant to the question of the obligations of shipowners making equipment available to stevedores. We find in the record before us no additional circumstances which could possibly constitute "conduct on [the shipowner's] • • • part sufficient to preclude recovery," *Weyerhaeuser S. S. Co.* v. *Nacirema Operating Co.*, 355 U. S. 563, 567 (1958), and the appellant has suggested none.

Affirmed.

Decision of the United States Court of Appeals for the Second Circuit on Petitions for Rehearing.

UNITED STATES DISTRICT COURT,

FOR THE SECOND CIRCUIT.

FRANK DRAGO,

Plaintiff-Appellee,

v.

A/S INGER,

Defendant and Third-Party Plaintiff-Appellee,

v.

DANIELS & KENNEDY, INC.,

Third-Party Defendant-Appellant,

and

ILLINOIS ATLANTIC CORP.,

Third-Party Defendant-Appellee.

HAIGHT, GARDNER, POOR & HAVENS, New York, N. Y., for third-party defendant-appellee, Illinois Atlantic Corp.

JOSEPH M. SOVIERO, New York, N. Y., for third-party defendant-appellant, Daniels & Kennedy, Inc.

The petition of the third-party defendant-appellant Daniels & Kennedy, Inc. is denied.

Petitions for Rehearing.

The petition of the third-party defendant-appellee Illinois Atlantic Corp. is granted and the opinion of the court is amended so as to insert at page 2378 of the slip opinion the following paragraph following line 15: "There is no substance in the appeal by Daniels & Kennedy, Inc. from the dismissal of its cross-claim against Illinois Atlantic Corp."

J. E. L.,

I. R. K.,

T. M.,
U. S. C. J.

August 17, 1962.

Decision of the United States Circuit Court of Appeals for the Second Circuit on Petition for Rehearing *in Banc*.

UNITED STATES DISTRICT COURT,

FOR THE SECOND CIRCUIT:

FRANK DRAGO,

Plaintiff-Appellee,

v.

A/S INGER,

Defendant and Third-Party Plaintiff-Appellee,

v.

DANIELS & KENNEDY, INC.,

Third-Party Defendant-Appellant,

and

ILLINOIS ATLANTIC CORP.,

Third-Party Defendant-Appellee.

JOSEPH M. SOVIERO, New York, N. Y., for third-party defendant-appellant Daniels & Kennedy, Inc.

No active circuit judge having requested that the case be reheard in banc, the petition is denied.

J. EDWARD LUMBARD,
Chief Judge.

August 17, 1962.

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IN THE

Supreme Court of the United States

October Term 1962

No. 466

DANIELS & KENNEDY, INC.,
Petitioner,

against

A/S INGER and ILLINOIS ATLANTIC CORP.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT ILLINOIS ATLANTIC CORP. IN OPPOSITION

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BRIEF OF RESPONDENT ILLINOIS ATLANTIC CORP. IN OPPOSITION

Opinions Below

The opinion of the United States District Court for the Eastern District of New York (Pet. App.* 1a-26a) is officially reported at 194 F. Supp. 398. The opinion of the United States Court of Appeals for the Second Circuit (Pet. App. 27a-34a) has not yet been reported, and its decisions on the petitions for rehearing and for rehearing *en banc* (Pet. App. 35a-37a) are not reported.

* Pet. App. refers to petitioner's appendix to its petition for a writ of certiorari.

Jurisdiction

The jurisdictional requisites are adequately set forth in the petition.

Questions Presented

The only reference to respondent Illinois Atlantic Corp. which can be culled from almost four pages of the petition covering the "Questions Presented for Review" is to be found in sub-paragraph 9 of the first question.

We do not believe that any of the matters relating to the position of respondent Illinois Atlantic Corp. in this litigation merit the consideration of this Court.

Respondent Illinois Atlantic Corp. does not take any position with respect to the questions presented by petitioner as they relate to respondent A/S Inger.

Statement

This petition arises from an action brought in the United States District Court for the Eastern District of New York, with jury trial demanded, by Frank Drago, as plaintiff, to recover damages from A/S Inger for injuries alleged to have been sustained by plaintiff while working as a longshoreman aboard a vessel owned by A/S Inger, while in the employ of Daniels & Kennedy, Inc., the stevedore engaged in the discharge of a cargo of paper from that vessel.

A/S Inger, as third-party plaintiff, served amended third-party complaints upon both Daniels & Kennedy, Inc. and Illinois Atlantic Corp., naming them as third-party defendants. Illinois Atlantic Corp. was the time-charterer of s/s Elin Hope under a New York Produce Exchange Form

timecharter (Pet. App. C.C.A. 624a*). Both Daniels & Kennedy, Inc. and Illinois Atlantic Corp. cross-claimed against each other, seeking indemnity to the extent of their respective liabilities, if any, to A/S Inger.

Only the main action was tried to a jury, it having been stipulated that the third-party actions and the cross-claims as between the two third-party defendants were to be tried to the Court.

The jury rendered a verdict in favor of plaintiff Drago on his negligence claim, while rendering a verdict in favor of A/S Inger on the issue of unseaworthiness. In addition, the jury found plaintiff to be 75% contributorily negligent and for that reason reduced his damages from $18,000 to $4,500.

After the jury verdict had been rendered, the Court proceeded to take testimony, accept exhibits and hear argument on the amended third-party complaint of A/S Inger as against both Daniels & Kennedy, Inc. and Illinois Atlantic Corp. These hearings culminated in Judge Zavatt's memorandum opinion of May 31, 1961 (Pet. App. 1a-26a). In that opinion Judge Zavatt granted indemnity to A/S Inger together with counsel fees and expenses as against third-party defendant Daniels & Kennedy, Inc., but denied A/S Inger's indemnity claim against Illinois Atlantic Corp.

In accordance with procedures previously agreed upon, the Court then proceeded to take testimony and hear argument on the cross-claim of Daniels & Kennedy as against Illinois Atlantic Corp. Since the Court had earlier dismissed the third-party complaint of A/S Inger as against Illinois Atlantic Corp., there was no need to take testimony or conduct hearings with respect to the latter's cross-claim as against Daniels & Kennedy, Inc. That issue had by then become moot.

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* Pet. App. CCA refers to petitioner Daniels & Kennedy, Inc.'s appendix as filed in the United States Court of Appeals for the Second Circuit.

The hearing on Daniels & Kennedy, Inc.'s cross-claim resulted in its dismissal, as encompassed in the final judgment, dated June 12, 1961 (Pet. App. C.C.A. 31a).

Multiple appeals were taken from the initial judgment entered following the jury verdict and from the final judgment of June 12, 1961. The only appeals, however, which were pressed before the United States Court of Appeals for the Second Circuit were as follows:

1. Daniels & Kennedy, Inc. appealed the initial judgment of October 24, 1960 and the final judgment of June 12, 1961 insofar as they awarded judgment to plaintiff as against defendant A/S Inger.

2. Daniels & Kennedy, Inc. appealed from the final judgment of June 12, 1961 insofar as it granted indemnity together with counsel fees and expenses to A/S Inger as against Daniels & Kennedy, Inc.

3. Daniels & Kennedy, Inc. appealed from the final judgment of June 12, 1961 insofar as it awarded judgment in favor of Illinois Atlantic Corp. dismissing the cross-claim of Daniels & Kennedy, Inc.

It is relevant to note that A/S Inger took no appeal from the final judgment of June 12, 1961 insofar as that judgment dismissed its amended third-party complaint seeking indemnity from Illinois Atlantic Corp. At that juncture, therefore, Illinois Atlantic Corp. remained as an active litigant and appellee only by reason of the appeal by Daniels & Kennedy, Inc. from the dismissal of its cross-claim.

The opinion of the United States Court of Appeals for the Second Circuit (Pet. App. 27a-34a) rejected Daniels & Kennedy, Inc.'s attack upon the basic judgment in favor

of plaintiff Frank Drago and affirmed the judgment of the District Court awarding indemnity, counsel fees and expenses to A/S Inger as against Daniels & Kennedy, Inc.

The opinion of the United States Court of Appeals, dated July 3, 1962, did not dispose of Daniels & Kennedy, Inc.'s appeal from the dismissal of its cross-claim as against Illinois Atlantic Corp., since the Court was apparently under the impression that the appeal had been dropped. A petition for rehearing was addressed to the Court asking it to rule on that phase of Daniels & Kennedy, Inc.'s appeal. This petition for rehearing resulted in an amendment to the original opinion of the Court, dated August 17, 1962 (Pet. App. 35a-36a), in which it was stated:

> "There is no substance in the appeal by Daniels & Kennedy, Inc. from the dismissal of its cross-claim against Illinois Atlantic Corp."

ARGUMENT

For the purposes of this brief in opposition we will restrict ourselves to the respective positions of petitioner Daniels & Kennedy, Inc. and respondent Illinois Atlantic Corp. We will not be concerned with the petition insofar as it refers to the granting of indemnity to respondent A/S Inger as against petitioner Daniels & Kennedy, Inc.

In an elaboration on the general finding of negligence by the jury, the Trial Court, in determining the indemnity claims of A/S Inger found that A/S Inger, the shipowner, was liable in negligence to plaintiff because a securing pin on the No. 2 starboard winch of s/s Elin Hope was missing at the time of plaintiff's injury. Nevertheless, the Trial Court allowed A/S Inger to recover indemnity from Daniels & Kennedy, Inc. on the grounds that the stevedore, having been aboard the vessel from 0800 to 1200 and again from 1300 to the time of the accident shortly thereafter, had notice that this pin was missing.

Nowhere during the course of the trial was there testimony or any proof that respondent Illinois Atlantic Corp. (the timecharterer) had any control over the ship's equipment, including the No. 2 starboard winch. As between the shipowner and the charterer, the charter is clear as to where the responsibility lay for the maintenance and upkeep of ship's equipment. Comments on this point can be found in the timecharter (Pet. App. C. C. A. 624a) as well as in Judge Zavatt's opinion of May 31, 1961 (Pet. App. 25a). Yet, respondent Daniels & Kennedy, Inc. now urges that it has a right to recover indemnity on its cross-claim from Illinois Atlantic Corp. after having had indemnity found against it in favor of respondent A/S Inger.

We submit that under the facts there is no merit to Daniels & Kennedy, Inc.'s cross-claim against respondent Illinois Atlantic Corp., that the decisions of the District Court and the Court of Appeals on the point were clearly correct, that the points of law are not the subject of any conflict of decisions in our Courts, and that no important questions of federal law are thereby raised warranting review by this Court.

The Decisions Below Are Clearly Correct

The Trial Judge was quick to see the inconsistencies in any argument which could be put forward on behalf of petitioner Daniels & Kennedy, Inc. in support of its cross-claim against respondent Illinois Atlantic Corp. If the duty of A/S Inger, as the shipowner, to inspect and maintain its own equipment did not prevent it from recovering indemnity from Daniels & Kennedy, Inc. in the first instance on a breach of warranty of workmanlike service theory, then how as a matter of logic could Daniels & Kennedy, Inc. in turn recover from the timecharterer, Illinois Atlantic Corp.?

A hearing was held on June 12, 1961 at which time counsel for third-party defendant Daniels & Kennedy, Inc. had an opportunity to present testimony, exhibits, and argument on the issue of the cross-claim (Pet. App. C. C. A. 607a-619a).

Daniels & Kennedy alleged that Illinois Atlantic "breached its undertaking as a supplier of marine equipment to provide safe and proper equipment" (Pet. App. C.C.A. 608a). Later counsel claimed that the "time charterer through the shipowner which acted as its agent in this case negligently supplied marine equipment, and, therefore, it breached its implied warranty to supply safe and proper marine equipment". The claim was made that Illinois Atlantic was an agent of the shipowner and would be liable for the breach by its principal (the shipowner) of its warranty to supply an adequately equipped No. 2 starboard winch.

Recent case authorities on the subject of indemnity have noted that a shipowner may be barred by its own conduct from enforcing a claim against a stevedore predicated upon a breach of warranty of workmanlike service. Perhaps these cases are best summarized in the language of Chief Judge Sobeloff in his opinion in *American Export Lines, Inc.* v. *Revel,* 266 F. 2d 82 (4 C. A. 1959), when he wrote at page 87:

> "We turn to a consideration of the judgments entered in the third-party actions. The Supreme Court recently indicated in Crumady v. The Joachim Hendrick Fisser, 358 U. S. 423, 79 S. Ct. 445, 3 L. Ed. 2d 413, that by merely supplying defective equipment the shipowner will not necessarily be barred from recovery on his contract of indemnity. We held in Calmar Steamship Corp. v. Nacirema Operating Co., 4 Cir., 266 F. 2d 79, that a finding of negligence in supplying such equipment is not determinative of the shipowner's right to indemnity. His action is in contract and recovery depends upon whether his conduct has been such as to bar enforcement of the

gent in regard to the longshoreman. Weyerhaeuser S.S. Co. v. Nacirema Operating Co., 1958, 355 U. S. 563, 78 S. Ct. 438, 2 L. Ed. 2d 491."

Our Courts contemplate that in a given situation the conduct of the shipowner may be such that it will not be permitted to enforce a claim for breach of warranty against the stevedore.

It is apparent that the Trial Court did not believe that the conduct of the shipowner in this case in supplying a winch without a locking pin was sufficient to bar its indemnity claim. How can we then logically say that the stevedore, which had been found guilty of a breach of warranty of workmanlike service, could recover indemnity from an "agent" for the shipowner on the very same theory which was insufficient to bar the shipowner from recovering initially against the stevedore?

The Trial Court quickly grasped the problem and stated (Pet. App. C.C.A. 611a):

> "The Court: Let me ask you this, are you in the same position in your cross-claim against the charterer as you are in resisting the claim of the shipowner?
>
> What's the difference?
>
> Mr. Green: I think your Honor has pinpointed it."

The colloquy immediately following points up even more clearly that counsel for Daniels & Kennedy, Inc. argues that if Illinois Atlantic was in any sense guilty of breach of contract it was because of the shipowner's fault.

Later in the colloquy (Pet. App. C.C.A. 613a) the Court commented upon the fact that it had already found that the shipowner was entitled to recover indemnity from the stevedore and stated further:

> "The Court: Now, how does the rationale of this opinion change because, instead of your having a

counter-claim against the ship owner, you assert a claim over against the charterer?

Mr. Green: To be frank with you, if we carry your opinion out to its logical conclusion, your Honor should dismiss my cross-complaint against the charterer. * * * "

Later in the colloquy there was discussion between the Trial Judge and counsel for Daniels & Kennedy on the Court's opinion granting shipowner indemnity (Pet. App. C.C.A. 616a):

"The Court: No. You can't like it, and I want you to frankly say so; but if the Court was correct in its holding as to the claim of the shipowner, the Court, to be consistent, could not grant your cross-claim against the charterer; is that right?

Mr. Green: I think your Honor is absolutely correct on that.

The Court: Right, and to grant your cross-claim against the charterer in the light of this opinion would be an absurd inconsistency; would it not?

Mr. Green: Yes, Judge."

The Court commented as follows at the close of the hearing on the issue of the cross-claim (Pet. App. C.C.A. 618a):

"The Court: How can the charterer be in a worse position than the owner?"

We submit that the answer to that rhetorical question is that under the facts of this case Illinois Atlantic Corp., the timecharterer, cannot be in a worse position than the shipowner. To permit the shipowner to recover indemnity from the stevedore in the first instance and then to follow up with a decision that the stevedore can then recover indemnity on its cross-claim against the timecharterer leads to legal and factual absurdities.

It would be absurd to impose upon Illinois Atlantic Corp. an obligation with respect to a failure of ship's

equipment even greater than that which was imposed upon the shipowner.

We respectfully submit that the Trial Judge was correct in dismissing the cross-claim of Daniels & Kennedy, Inc. as against Illinois Atlantic Corp.

The United States Court of Appeals for the Second Circuit was similarly unimpressed with the argument put forward by Daniels & Kennedy, Inc. in support of its cross-claim, stating that there was "no substance" to it.

There was no contract between Illinois Atlantic Corp. and Daniels & Kennedy, Inc. No stretch of the imagination could put Illinois Atlantic Corp. in the position of a supplier of marine equipment vis-a-vis the stevedore, Daniels & Kennedy, Inc. Daniels & Kennedy, Inc. was hired by the News Syndicate Co., Inc., the publisher of the New York Daily News, and not by any of the parties to the action. Illinois Atlantic Corp. was only one of a chain of charterers, sub-charterers and shippers in an operation involving the shipment of paper from Baie Comeau, Quebec to New York. Nor is there any support in the record for any claim that Illinois Atlantic Corp. was an agent for the shipowner insofar as the stevedoring operations were concerned.

There Is No Conflict of Decision

Petitioner, Daniels & Kennedy, Inc., has not urged that the decisions of the courts below on the issue of its cross-claim against Illinois Atlantic Corp. are in conflict with any decisions of this Court, of the United States Courts of Appeals or the highest Courts of any of our 50 States.

There Is No Important Question of Federal Law Presented and the Issues on Daniels & Kennedy, Inc.'s Cross-Claim Against Illinois Atlantic Corp. Do Not Warrant Review by This Court

Daniels & Kennedy, Inc. has not claimed in its petition that the disposition of its cross-claim against Illinois Atlantic Corp. both in the United States District Court for the Eastern District of New York and in the United States Court of Appeals for the Second Circuit does violence to any important federal question. As a matter of fact, the issue of the cross-claim is so completely minor that it becomes totally submerged in the issues revolving around the recovery of indemnity by A/S Inger, the shipowner, against Daniels & Kennedy, Inc., the stevedore.

Assuming for the moment the correctness of the courts below in permitting A/S Inger to recover indemnity from Daniels & Kennedy, Inc., then to permit Daniels & Kennedy, Inc. to recover on its cross-claim against Illinois Atlantic Corp. would be to impose upon the latter, as time-charterer, an obligation with respect to a failure of the vessel's equipment greater than that which was imposed upon the shipowner in the first instance. As pointed out earlier in this brief, we believe that the absurdity of such a proposition is patent.

On the other hand, assuming that the courts below were in error in granting indemnity to A/S Inger as against Daniels & Kennedy, Inc., then the latter's cross-claim against Illinois Atlantic Corp. becomes moot. Daniels & Kennedy, Inc.'s cross-claim against Illinois Atlantic Corp. has reason for existence only in the event of Daniels & Kennedy, Inc.'s liability.

Should this Court, for any reason, choose to grant Daniels & Kennedy, Inc.'s petition, such a grant should be limited to the issues as between Daniels & Kennedy, Inc. and A/S Inger. For the reasons noted above, the issues

raised by Daniels & Kennedy, Inc.'s contingent cross-claim against Illinois Atlantic Corp. do not warrant the attention of this Court under any circumstances. The cross-claim cannot be supported in the event Daniels & Kennedy, Inc. is liable. The cross-claim becomes moot in the event Daniels & Kennedy, Inc. is not liable.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM 1962

No. 466

DANIELS & KENNEDY, INC.,

Petitioner,

against

A/S INGER and ILLINOIS ATLANTIC CORP.,

Respondents.

BRIEF FOR RESPONDENT A/S INGER IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Statement

Respondent A/S Inger opposes the petition for a writ of certiorari.

It does not, for present purposes, question the "Statement of the Case" given at pages 6 to 13 of the petition; indeed, it agrees that petitioner's statement, although in good measure argumentative, may be accepted on the consideration of the petition.

But petitioner's argument, in support of its contention that a writ should issue, fails even to suggest the existence of a conflict of determinations in the courts of appeal or of a substantial matter of federal law deserving of the attention of this Honorable Court under its certiorari powers.

For that reason it appears proper that the petition be denied.

Argument in Opposition to the Petition

I

The controlling principles of law applicable to stevedore warranty cases have been clearly defined, *Ryan Stevedoring Co.* v. *Pan-Atlantic S. S. Corp.*, 350 U. S. 124; *Weyerhaeuser S. S. Co.* v. *Nacirema Operating Co.*, 355 U. S. 563; *Crumady* v. *The Joachim Hendrik Fisser*, 358 U. S. 423; *Waterman S. S. Corp.* v. *Dugan & McNamara, Inc.*, 364 U. S. 421; and have been consistently applied by the courts of appeals, *e.g.*, *Santomarco* v. *United States*, 2 Cir. 1960, 277 F. 2d 255; *Calmar S. S. Corp.* v. *Nacirema Operating Co.*, 4 Cir. 1959, 266 F. 2d 79; *American Export Lines* v. *Revel*, 4 Cir. 1959, 266 F. 2d 82; *Royal Mail Lines, Ltd.* v. *Peck*, 9 Cir. 1959, 269 F. 2d 857.

The instant petition discloses no basis for contention that the judgment of the Court of Appeals is at variance with those principles.

The fallacy inherent in petitioner's argument is apparent. It is that a vessel owner, as respondent A/S Inger here, is to be considered a contractual supplier of equipment for the benefit of a stevedore, and is a warrantor, as to a stevedore, of the fitness of that equipment. Petitioner appears to argue that the vessel owner, and not the stevedore, is the expert in the loading and discharging of cargo and in the management and use of cargo gear and equipment.

The response of the Court of Appeals to that argument, when it was proposed below, fairly reflects its essential inconsistency with the substance of maritime-contractor warranty law (305 F. 2d 139 at 143; petition, pp. 33a, 34a):

> "Appellant argues, however, that the shipowner violated a contractual duty to the stevedores to supply them with proper winches. . . . As we have recently held in *Pettus* v. *Grace Line, Inc.*, *supra* [305 F. 2d

151], a shipowner's breach of contract in failing to supply adequate equipment to its stevedores is not sufficiently material to excuse the stevedores from the contractual duty to give proper service on which the indemnity claim is here based. The cases cited to us by the appellant dealing with the warranties of professional suppliers of equipment, e.g., *Booth S. S. Co. v. Meier & Oelhof Co.*, 262 F. 2d 310 (2 Cir., 1958), are wholly irrelevant to the question of the obligations of shipowners making equipment available to stevedores."

II

Petitioner's further point of argument (petition, pp. 30-33), that the clauses of the stevedore's contract with the cargo consignee bar implied-in-fact indemnity, does not seem to be amenable to review, in light of the District Court's findings (petition, pp. 19a, 20a, 22a), accepted by the Court of Appeals (305 F. 2d 139 at 141; petition, p. 30a), that the parties to that contract did not intend to make the shipowner a beneficiary of the specific indemnity clause and that the stevedore did not bargain for such limitation of its liability.

CONCLUSION

There appearing no reason why this Honorable Court should issue a writ of certiorari, it is prayed that the petition be denied.

New York, New York, October 19, 1962.

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